Case No. S168078

SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AUG 9 2010

Frederick K. Ohlrich Clerk
Deputy

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

vs.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents,

DENNIS HOLLINGSWORTH, et al.

Interveners.

CORRECTED REPLY OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.

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INTRODUCTION

There have been some dark periods in California's otherwise proud history – periods when an impassioned majority took basic rights away from unpopular groups. Immigrants of Asian descent were denied the right to own land. Women were denied the right to vote. African Americans were prevented from marrying whites, and later the electorate attempted to constitutionalize housing discrimination against them and other disfavored minorities.

Interveners cite this history as evidence for why the Court should uphold Proposition 8. We believe it shows precisely why the Court should strike the measure down. For in each prior instance, California's leaders rose to the occasion, recognizing that despite the temporary views of an intemperate majority, the deeper, more lasting principle of equality must prevail.

Those leaders were, in most instances, members of this Court. When a political majority denied land ownership to Asian immigrants, it was the California Supreme Court that finally took a stand to protect liberty for all. When the political majority denied the right to interracial marriage, this Court was the first in the nation to recognize that such measures are fundamentally opposed to our democratic way of life. When a majority of voters attempted to constitutionalize racial discrimination in housing, the Court stood with another leader – the Attorney General – to prevent the measure from taking effect.

The enactment of Proposition 8 represents an equally dark moment in California's history. The enshrinement of marriage discrimination into the Constitution tells same-sex couples and their children that their own government does not deem them worthy of equal dignity. It tells lesbians

and gay men that they are lesser citizens than deadbeat parents, lesser than people thrice divorced, and even lesser than murderers on death row, for all those people retain the right to marry. This is not a proper subject for the initiative process.

Measures that seek to go further than simply "amending" the Constitution must undergo a more deliberative process than a political campaign. One category of such measures are those that would revise the Constitution in a quantitative sense – making numerous changes to the document. Although Proposition 8 does in fact collide with multiple constitutional provisions, the Petitioners in these cases have not contended that it is a quantitative revision.

Other measures may not be enacted through the initiative process because, even though they may only purport to change the Constitution in one way, the proposed change would alter the basic structure of our government. That is one of the reasons Proposition 8 constitutes a revision rather than an amendment: to uphold Proposition 8 as a valid amendment would create a new constitutional rule altering the distribution of power between majority groups and minority groups, and among the judiciary, the legislature and the electorate. The new rule would thus dramatically change our democracy in a structural sense. Under the old Constitution, the most vulnerable citizens of California could rest assured that their fundamental rights would not be revoked by an impulsive majority. This protection came not only from the judiciary, but also from the legislature – which under article XVIII serves as a shield against the kind of majority tyranny that our constitutional founders so greatly feared. But the new California Constitution – the Constitution that would exist following a ruling upholding Proposition 8 as a valid amendment – would not even

shield minority groups that enjoy the most heightened constitutional protection from invidious discrimination. The electorate would have the final word on such matters. And the courts would be stripped of their most important constitutional responsibility – to serve as the final bulwark against oppression of the most constitutionally protected minority groups – in violation of the separation of powers principle. Such a rule has never existed in California before. It is a sea change from a structural perspective – indeed it is a reordering of our democratic system.

But there is another reason Proposition 8 falls outside the scope of the amendment power, and it is identified by the Attorney General. That is, regardless of the structural implications of a particular measure, it must be deemed beyond the amendment power if it selectively denies basic, fundamental rights in a way that our constitutional system does not and has never tolerated. The Attorney General contends this issue should be considered apart from the amendment/revision framework. We believe that, in addition, the argument set forth by the Attorney General shows why Proposition 8 readily falls on the "revision" side of the line under article XVIII, even if the nine existing revision cases did not consider this question. After all, the purpose of article XVIII is to ensure that the most significant changes to the Constitution are enacted through the most deliberative processes. And the basic, fundamental rights protected by the California Constitution occupy the highest perch on the constitutional ladder. Not only are they listed first in the document; their preservation is widely understood to be essential to the survival of our democracy. It would make little sense to conclude that measures seeking to selectively revoke essential, fundamental rights protected by the California

Constitution would not be subject to the revision process, while arguably less important structural changes would be.

It is unnecessary for the Court to identify all the circumstances in which measures purporting to diminish fundamental rights fall outside the scope of the amendment power, because in this case, Proposition 8 could not possibly cut more directly against the constitutional grain. It violates the fundamental principle of equality embedded in the Constitution, which holds that the political majority may not impose special disabilities on a subset of society. Worse, it violates that principle with respect to a fundamental right – the right to marry – that is protected under the liberty and privacy clauses of our Constitution, and that has been described by the United States Supreme Court as "one of the basic civil rights of man." *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). If that were not enough, the measure denies the fundamental right to marry not to just anyone, but to a group of people – lesbians and gay men – that receives heightened constitutional protection because of the history of baseless state-sponsored persecution and societal discrimination they have suffered.

Thus, Proposition 8 is not a tinkering or an adjustment; it does not merely alter a detail. To allow a political majority to deny equality in this circumstance is to obliterate the concept of equal protection and the fundamental rights our Constitution protects. If a more deliberative process is not required for a measure like this, then the procedural protections of article XVIII are rendered toothless, and the California Constitution is rendered spineless.

Against all this, Interveners threateningly intone that the people have spoken. But that is question-begging. The people, through the exercise of their *sovereign* power, created a Constitution that limits the *legislative*

power of the electorate to adopt measures that are so contrary to our fundamental constitutional principles. And when the people created the Constitution, they assigned the courts the duty to enforce the limitations on their amendment power. This is admittedly a difficult duty to be assigned, because it calls upon courts to strike down measures passed by a majority of the electorate on what might seem, to an uninformed observer, like a "technicality." But this procedural protection is far more than a technicality; it is a protection against rashly imposed constitutional enactments that threaten our deepest constitutional principles.

A recognition that a political majority may not strip fundamental rights from a constitutionally protected minority does not diminish the power of the people to enact initiative constitutional amendments. In the vast run of cases, the initiative power would be entirely undisturbed by a holding that Proposition 8 is a revision. A political majority can amend the Constitution to change our system of taxation, regulate the conduct of elections, ensure access to public records, require public funding for different legislative priorities, and much more. But a measure like Proposition 8 has never been accomplished by initiative. And it is difficult to imagine a measure that could cry out more loudly for the sober and deliberative process of revision. The Court should strike it down.[1]

BACKGROUND

The picture Interveners paint of California's constitutional history bears little resemblance to reality. They contend the principle of equal protection is but a constitutional afterthought, not recognized until 1974.

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[1] As discussed in Section III below, even if Proposition 8 were validly enacted, it is not retroactive. And as discussed in Section IV, the City and County of San Francisco and its allies have standing in this case.

They assert that members of the California Supreme Court are servants who must "bow" to the people. And they contend the California Constitution does nothing to prevent a majority of voters from discriminating against any minority group for any reason, no matter how severe the discrimination.

Because Interveners' defense of Proposition 8 depends entirely upon these drastic assertions about California's constitutional tradition, it is necessary to examine that tradition in some detail.

A. The Principle of Equality.

From its inception, the California Constitution has embraced the following principle of equality: if the government is to impose disabilities upon its citizens, it must do so upon them as a whole, not just upon a disfavored group. This principle was inherited from the nation's founders. As Madison stated, "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part." The Federalist No. 51, at 320-321 (James Madison) (Clinton Rossiter ed., 2003). Systems that failed to protect against the tyranny of the majority, Madison recognized, "have in general been as short in their lives as they have been violent in their deaths." The Federalist No. 10, at 76 (James Madison) (Clinton Rossiter ed., 2003).

Members of California's first constitutional convention were also solicitous of this principle. As one stated, "this constitution [is] to be formed with a view to the protection of the minority...the native Californians. The majority of the community is the party to be governed; the restrictions of the law are to be interposed between them and the weaker party; they are to be restrained from infringing on the rights of the

minority." J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849*, 22 (Wash. 1850) ("Report of the Debates at the 1849 Constitutional Convention") (Comments of Mr. Gwin), *available at* http://books.google.com/books?id=TBY4AAAAIAAJ&printsec=frontcover &dq=debates+california+1849&lr=&as_brr=0&as_pt=ALLTYPES. And as another simply put it, the "object of the Constitution [is] to protect the minority . . . " *Id.* at 309 (Comments of Mr. Botts).

Perhaps the best modern-day expression of this principle comes from Justice Scalia, who emphasized that our system "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

The original California Constitution contained numerous provisions designed to effectuate this principle. *See, e.g.*, Cal. Const. of 1849, art. I, §§ 1, 8, 11. And even more equality provisions were added during the constitutional convention of 1879. *See* Cal. Const. of 1879, art. I, § 21, art. IV, § 25; art. XX, § 18. And the foundational nature of our belief in equality was reflected in the language of many other sections of our Declaration of Rights. *See, e.g.*, Cal. Const., art. I, § 1 ("*All people* . . . have inalienable rights . . . "); *id.* § 2(a) ("*Every person* may freely speak . . . his or her sentiments on all subjects . . . "); *id.* § 3(a) ("*The people* have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."); *id.* § 4 ("Free exercise and enjoyment of religion *without discrimination or preference* are guaranteed.") (emphasis added).

The equality provisions necessarily had independent force in the early years of the California Republic, because at that time Californians could not look to the federal Bill of Rights for protection. *See, e.g.*, Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 Hastings Const. L.Q. 141, 143 (2004). And from early on, they operated to protect minority groups from oppression and unequal treatment. For example, in *In re Maguire*, 57 Cal. 604, 609 (1881), the Court applied article XX, section 18 (prohibiting employment discrimination on the basis of sex) to strike down an ordinance that banned women from waiting on customers in an establishment that sold alcoholic beverages. The Court emphasized that while the government could regulate matters pertaining to morality, the Constitution required that it do so in a manner that "shall affect both sexes alike." *Id.* Similarly, in *Britton v. Bd. of Election Comm'rs*, 129 Cal. 337, 342 (1900), the Court struck down a law that denied minor political parties the right to appear on the ballot and to hold political conventions. Invoking both the Privileges and Immunities provision of the 1879 Constitution (art. I, § 21) and the requirement that general laws have uniform application (art. I, § 11), the Court struck down the law because it singled out minor parties for adverse treatment: "[I]f the law be wise and beneficent, every organized political party must come under its cloak. If, upon the other hand, the law be unwise or inexpedient, none the less every political party must equally suffer the burden and bear the consequences." *Id.* at 341.

Interveners are thus clearly wrong when they assert that the adoption of the equal protection clause in 1974 demonstrates that equal protection is not a foundational principle of California's democracy. The 1974 addition reinforced – but did not substantively change – the equality principle. In

fact, the earlier equality provisions were "inextricably intertwined," and the new equal protection clause amounted to a consolidation of provisions that had been "separately placed throughout the constitution." Cal. Const. Revision Com., Article I Declaration of Rights Background Study 2, at 8, 16-17 (1969) ("Background Study").[2]

Of course, the addition of an express equal protection clause, coupled with a new provision declaring the independence of the State Constitution from the federal Constitution, article I, section 24, underscored the importance of equality as a state constitutional norm. But the suggestion that it proves the absence of a fundamental equality principle prior to that time ignores history. Indeed, well before 1974 the preexisting equality provisions had already been interpreted by this Court as equivalent to the equal protection clause of the Fourteenth Amendment. *See People v. Western Fruit Growers, Inc.*, 22 Cal. 2d 494, 506-07 (1943); *County of Los Angeles v. So. Cal. Tel. Co.*, 32 Cal. 2d 378, 389-90 (1948).

Interveners point to the fact that some of this Court's early equal protection rulings relied on the federal Bill of Rights as evidence that equal protection did not exist under the California Constitution until 1974. But the decisions cited in the paragraphs above belie that notion. Although "the independent status of state constitutional rights became largely a forgotten concept" for some period of time, it is "abundantly clear that the draftsmen

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[2] Interveners are also wrong that the equal protection clause was adopted by mere amendment. It was added as part of a revision that changed numerous provisions in our Constitution's Declaration of Rights, and that was one of several revisions enacted by the voters after submission by the Legislature and based on recommendations of the California Constitution Revision Commission in the 1970s. *See* A.G. Ans. Br. at 19, n.4.

of the 1849 and 1879 constitutions regarded the California Constitution as the principal bulwark protecting the liberties of Californians from governmental encroachment." Joseph R. Grodin *et al.*, The California State Constitution: A Reference Guide 10, 21 (Greenwood Press 1993).

Finally, as Interveners take pains to point out, there have been dark moments in our history – moments where the equality principle existed in theory but was applied selectively in practice, preventing people of Asian descent from owning land, and permitting other forms of discrimination against racial minorities and women. It has been a great struggle to extend the application of the equality principle to minority groups historically thought to be lesser members of society, and there have been failures. Even the founders recognized that the principle of equality was only as strong as the leaders entrusted to preserve it:

> A free people, in the enjoyment of an elective government, capable of securing their civil, religious, and political rights, may rest assured these inestimable privileges can never be wrested from them, so long as they keep a watchful eye on the operations of their government, and hold to strict accountability, those to whom power is delegated.

Report of the Debates at the 1849 Constitutional Convention, at 474.

But as California's democracy has matured, our leaders have been increasingly faithful to the equality principle. One of the greatest examples, of course, is *Perez v. Sharp*, 32 Cal. 2d 711 (1948), a critical early link in a historical chain of events that has culminated in the election of a President born of an interracial marriage. Others are *Mulkey v. Reitman*, 64 Cal. 2d 529 (1966), *aff'd*, 387 U.S. 369 (1967), which struck down an initiative amendment that permitted racial segregation in housing; *In re Guardianship of Yano*, 188 Cal. 645 (1922) and *Sei Fujii v. State*, 38 Cal. 2d 718 (1952), which invalidated in part and then in its entirety a

measure, partially adopted by initiative, that prevented Japanese citizens from owning land in this State; *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1 (1971), which held that laws discriminating against women could not stand unless they satisfied the strict scrutiny test; and *In re Marriage Cases*, 43 Cal. 4th 757 (2008) – a decision with great potential to lead to the removal of societal barriers for lesbians and gay men in California and throughout the nation. *See, e.g., Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (2008) (relying heavily on *In re Marriage Cases*).

To borrow Justice Ginsburg's words, "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Interveners' eager recitation of the dark moments of California's history does nothing to help their case. It does not change the fact that equal protection is a foundational principle of California's constitutional democracy – one that has been applied with greater consistency and strength as history has progressed.

B. The Equality Principle And Fundamental Rights.

Particularly in light of the argument set forth by the Attorney General at 75-90 of his Answer Brief, it bears special emphasis that the equality principle is not solely reflected in the equal protection provisions discussed above. It is engrained far more broadly, and deeply, in our constitutional structure. It is not just a stand alone section or idea, but an overarching principle that lies at the foundation of every other provision of the Declaration of Rights. Article I, section 1 speaks in terms of "all people" for a reason. If the government can selectively take away inalienable rights from one group, no group is safe. If the government

denies a fundamental right to one group, all others have good reason to fear that their rights may be taken away next.

For that reason, the equality principle is most important when it intersects with fundamental rights embodied in such inalienable rights provisions as the liberty or privacy clauses. Of course, not all matters touched by the liberty and privacy clauses implicate fundamental rights. A fundamental right exists not just with respect to any liberty, but only to "liberties that are so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (internal quotations omitted). But when fundamental rights *are* involved (such as the fundamental right to marry), governmental infringements on those rights are presumptively invalid. For the preservation of these basic fundamental rights is essential to our democratic way of life. That is why Justice Carter said of California's ban on interracial marriage, "the statutes here involved violate the very premise on which this country and its Constitution were built, the very ideas embodied in the Declaration of Independence, the very issue over which the Revolutionary War, the Civil War, and the Second World War were fought, and the spirit in which the Constitution must be interpreted . . . " *Perez*, 32 Cal. 2d at 740.[3]

The equality principle is inextricably intertwined with the fundamental rights protected by the California Constitution. Indeed, these

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[3] *See also Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (right to marry conferred by the federal due process and privacy clauses is "one of the basic civil rights of man," "of fundamental importance for all individuals" as well as "the foundation of the family and of society, without which there would be neither civilization nor progress") (citations and internal quotations omitted).

rights themselves have a predominant equality-protecting component, and it is that component which gives them their primary strength. That is why this Court emphasized in the *Marriage Cases* that "equal dignity and respect . . . is a core element of the constitutional right to marry." 43 Cal. 4th at 831. *See also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."). Fundamental rights embodied in the liberty and privacy clauses simply do not serve our democracy if they may only be enjoyed by the powerful.

C. The Equality Principle And Constitutionally Protected Minority Groups.

If the equality principle is magnified when it intersects with inalienable rights, it is at its zenith when a political majority threatens the fundamental rights of minority groups that receive heightened constitutional protection. While the equality principle applies to all citizens, it has long been recognized that historically marginalized groups require heightened constitutional protection. That is because the majoritarian political process is far less apt to protect them. "[A] special mandate" compels the judiciary to give such groups heightened constitutional protection, because "'[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.'" *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 579 (1969) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 & n.4

(1938)). And as this Court has already held, the California Constitution requires heightened judicial scrutiny of attempts to deny the rights of lesbians and gay men:

> Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification.

Marriage Cases, 43 Cal. 4th at 844.[4]

D. The Role Of The California Judiciary.

In addition to contending that equal protection did not exist in California until 1974, Interveners use threatening language to describe the role of the Court: "Here, we the people govern, and judges and Justices – even of the state's highest Court – serve those to whom they are ultimately accountable." Int. Br. at 6. Interveners misunderstand this Court's role in determining whether a measure qualifies as a revision or an amendment. The Court is not required to defer to the people on that question; otherwise, it would have lacked the power to hold, in *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), that Proposition 115 was unconstitutional. Rather, the people, through the adoption of article XVIII, have conferred upon the judiciary not just the power but the responsibility to determine whether a measure falls within the scope of the initiative power, or whether the Constitution requires that the measure be enacted through the more deliberative revision process. And in considering whether Proposition 8 is a valid amendment,

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[4] We refer in this brief to members of a group for which legislative classifications are "suspect" and thus subject to strict scrutiny in the shorthand as "suspect classes."

the Court must assess the effect of this measure on the fundamental principles described above that have been embedded in our Constitution since the beginning. This includes the equality principle and the inalienable rights discussed above. And it includes the principle, embodied in article VI, section I and recognized since the founding, that the courts are the best, and sometimes the only, body capable of enforcing those principles against the tyranny of a political majority.

As the framers of the United States Constitution recognized, "the independence of judges" is "an essential safeguard against the effects of occasional ill humors in the society" and against "injury of the private rights of particular classes of citizens, by unjust and partial laws." The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 2003). This role of the judiciary was recognized early in California's history as well. *See, e.g, Nougues v. Douglass*, 7 Cal. 65, 70 (1857); *People ex rel. Attorney Gen. v. Wells*, 2 Cal. 198, 213 (1852). More recently, the Court has explained that central to our democracy is "the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." *Bixby v. Pierno*, 4 Cal. 3d 130, 141 (1971).

Nor has this affirmation of the role of the judiciary been limited to pronouncements by the courts. The Governor has repeatedly recognized that, like all questions involving inalienable rights, the liberty interest of same-sex couples in the right to marry is a matter upon which the Court should have the final word. The Attorney General, in urging this Court to

strike down Proposition 8, recognizes this as well. Only Interveners refuse to do so.[5]

Consistent with this understanding, California's judiciary – and particularly the California Supreme Court – has a proud tradition of upholding the equality principle against attacks by political majorities. Indeed, the last time a political majority attempted to enshrine discrimination against an unpopular group into the Constitution, this Court did not "bow" to the will of the people, but rather struck down an initiative amendment that authorized racial discrimination in housing. *Mulkey*, 64 Cal. 2d 529. Like now, this was at the urging of the Attorney General of California.[6] Nor has the Court simply deferred to discrimination against unpopular groups in other contexts. In *Gay Law Students Ass'n. v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 467 (1979), the Court ruled that the California Constitution prohibits public utilities from discriminating against

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[5] Indeed, the Governor's understanding of the role of the judiciary stands in stark contrast to the views expressed by the sponsors of Proposition 8. While the Governor has stated that he would "respect" and "uphold" the Court's marriage ruling and that the Court should strike down Proposition 8, the sponsors of the initiative contended that "four activist judges in San Francisco wrongly overturned the people's vote." *Compare, Schwarzenegger Says He Respects Court's Marriage Ruling,* S.F. Chron, May 15, 2008, and *Schwarzenegger Suggests Court Should Block Prop. 8,* Sacramento Bee, Nov. 17, 2008, with Official Voter Information Guide, Argument in Favor of Proposition 8 ("Voter Guide"), *see* Declaration of Therese M. Stewart in Support of Request for Judicial Notice ("RJN Dec."), Exhibit 1.

[6] Bob Egelko, *Brown First in Decades to Go Against Voters,* S.F. Chron., Dec. 24, 2008, at A1; RJN Dec. Ex. 3 (Brief of the State of California as Amicus Curiae in the case of *Reitman v. Mulkey*, 387 U.S. 369 (1967)); RJN Dec. Ex. 2 (ballot arguments for the initiative at issue in *Mulkey v. Reitman*, 64 Cal. 2d 529 (1966)).

lesbians and gay men in employment, well before the legislature adopted such a measure.

As discussed in greater detail in Section II below, Interveners' view that the Court must assume that Proposition 8 is a valid amendment because 52 percent of the electorate voted for it ignores the circumstance that, in determining whether Proposition 8 falls within the scope of the amendment power, the Court must consider its effects on the Constitution *as a whole*. To use the words of Justice Marshall, "we must never forget, that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original).

E. The Limits Of The Initiative Power.

Finally, a key part of California's constitutional tradition is that, contrary to the federal system, the people take direct part in the evolution of the Constitution, because they have the power to amend it by majority vote. *See* Cal. Const. art. XVIII, § 3. Interveners, of course, make much of this. They take the view that section 3 of article XVIII eclipses all the fundamental constitutional principles discussed above – that none of these principles applies *at all* when the electors seek to amend the Constitution. Under the California Constitution, they argue, the types of discrimination that may be accomplished by an impassioned majority is *utterly limitless*, both in terms of the target of the discriminatory action and the severity of the oppression. If the people enacted an amendment to prevent lesbians and gay men from owning property or from voting, under Interveners' approach, the California Constitution would have nothing to say about it. This is wrong for a variety of reasons.

As a threshold matter, Interveners erroneously assume that an initiative constitutional amendment represents the exercise of the full

sovereign power of the State of California. *See* Int. Br. at 29. In reality, when a majority of voters enacts an initiative – including an initiative that amends the Constitution – the majority is acting in a *legislative* capacity. The voters exercise a power that was once delegated to the legislature but is now also reserved to the people. *See* Cal. Const. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum."). Accordingly, as this Court recently explained, "the electorate acting through its initiative power" is a "constitutionally empowered *legislative* entity . . ." *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016, 1045 (2007) (emphasis added). *See also id.* (recognizing that the electorate, in enacting the constitutional amendment at issue, "exercised its constitutional authority as a legislative entity"); *cf. Livermore v. Waite*, 102 Cal. 113, 117 (1894) (contrasting constitutional convention, which represents "entire sovereignty of the people," with amendment process).[7]

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[7] It is true, of course, that the legislative power reserved to the electorate is not precisely the same as the legislative power vested in the legislature. Just as the people have certain powers that are not vested in the legislature, the legislature has powers not reserved to the people. *Compare* Cal. Const. art. II, § 10(c) ("The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.") *with* Cal. Const. art. II, § 12 ("No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the voters or have any effect.").

If Interveners were correct that initiative amendments involve the exercise of the full sovereign power, perhaps the principles of equality, inalienable rights, and judicial protection of minority rights would indeed be superseded by section 3 of article XVIII. But once the amendment power is properly understood, Interveners' assertion that all other constitutional principles must give way, no matter how central to the survival of our democratic system, is rendered hollow. It is not to be lightly assumed that one constitutional provision eclipses numerous others, particularly when those other provisions form such a critical part of our constitutional foundation. Rather, when constitutional provisions are in tension, they should be harmonized. *See City & County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 563 (1995). The amendment power conferred by article XVIII, section 3 must be harmonized with the equal protection provisions, the liberty clause, the privacy clause, the separation of powers clause (article III, section 3), the clause conferring the judicial power (article VI, section 1) and the provision that requires the California Constitution to be construed as a document of independent force with independent protections (article I, section 24).

At bottom, Interveners' argument that the California Constitution requires this Court to defer to the roughly 52 percent of voters who enacted Proposition 8 ignores the fact that *all* provisions of the Constitution "constitute the ultimate expression of the people's will." *In re Marriage Cases*, 43 Cal. 4th at 852. While the initiative power must be liberally construed, "the interpretation adopted must be reasonable." *McFadden v. Jordan*, 32 Cal. 2d 330, 332 (1948). Article XVIII, section 3 must not be

construed so broadly as to eclipse all other protections contained in the California Constitution, no matter how sacred or fundamental.[8]

The electorate's historical use of the amendment power shows that this power is not inconsistent with, and in fact *can* be harmonized with, the other constitutional provisions discussed above. Of the approximately 45 constitutional amendments enacted by the people since 1911, only one operated to single out a suspect class for deprivation of a fundamental right so as to violate the above-discussed principle of equality. And it was struck down. *Mulkey*, 64 Cal. 2d at 536-37. The remaining amendments did not constitute a direct attack on the equality principle – not even close. Instead, the amendments made "addition[s] or change[s] within the lines of the original instrument," *Livermore*, 102 Cal. at 118-19, such as eliminating the poll tax (Proposition 10, enacted 1914); restricting property taxes (Proposition 13, 1978); establishing the State Lottery (Proposition 37, 1984); imposing a tax on tobacco products (Proposition 99, 1988); and prohibiting state and local taxes on food products (Proposition 163, 1992).[9] In other words, the power to amend the Constitution, as a practical and historical matter, easily co-exists with the equality, liberty, privacy and

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[8] Interveners also argue that article XVIII, section 3 may safely be construed to eclipse all other provisions of the California Constitution because the United States Constitution will protect against any measure that is contrary to the federal document. This argument, which ignores that the protections provided by the California Constitution may not be rendered subservient to the United States Constitution or those who interpret it, is discussed at pp. 29-30, *infra.*

[9] *See also* Opening Brief at 23 (listing and describing seven recent initiative amendments enacted by the electorate). A full list of initiative amendments is available at http://library.uchastings.edu/library/california-research/ca-ballot-measures.html#ballotprops.

separation of powers provisions of the California Constitution. This underscores the reality that, contrary to Interveners' language about "the will of the people," the essential power of the voters to amend the Constitution is not disturbed by a conclusion that this power does not include the ability to selectively diminish the fundamental rights of suspect classes.

In short, the result of this case is not foregone by the November 2008 election. Rather, the case presents a question of first impression: whether, under the California Constitution, a bare majority may selectively diminish the fundamental rights of a suspect class, and whether the majority may wrest from the judiciary the final word on that question.

DISCUSSION

I. PROPOSITION 8 IS A REVISION FOR STRUCTURAL REASONS.

A. A Decision Upholding Proposition 8 Would Inevitably Create A New Constitutional Rule That Fundamentally Restructures Our Democratic System.

Although Proposition 8 purports to accomplish the "narrow" goal of eliminating marriage equality, a holding that Proposition 8 is a valid amendment would inevitably create a new constitutional rule that a bare majority of voters may single out a suspect class and deny the members of that class their fundamental rights. In light of California's constitutional traditions discussed at pp. 6-14, *supra*, this would be a cataclysmic change for our society. Under the old Constitution, the people could rest assured that their inalienable rights truly were inalienable – that the principle of equality protected them. Under the new Constitution, the people would live under the shadow of a majority that may selectively deny rights, no matter how important to our democratic way of life. Where once the judiciary was the protector against the selective deprivation of inalienable rights by an

impassioned majority, now the final word rests with the voters. Where once the Constitution assigned the legislature a duty to serve as a filter against the tyranny of the majority, now that critical institutional safeguard has been taken away. In short, under the new Constitution, the equality principle rests not in the hands of the institutions that were assigned its guardianship; it rests in the hands of a majority of the electorate. In all these respects, a ruling upholding Proposition 8 would "substantially alter the substance and integrity of the state Constitution . . . ." *Deukmejian*, 52 Cal. 3d at 352.

As discussed at length in our Opening Brief at pp. 28-35, one of the reasons Proposition 8 must be deemed a structural revision is that a decision upholding it would strip the judiciary of its responsibility to utter the final word on the protection of fundamental rights for suspect classes. *See also s*ubsection B, *infra*. But the legislature too has a constitutional responsibility to uphold the equality principle. A decision upholding Proposition 8 would eviscerate that constitutional responsibility as well.

This responsibility is inherited from our nation's founders, who believed that the legislative branch would serve as the *primary* protector, even if not the final protector, against majority tyranny. As James Madison recognized, when a faction or interest group takes on the strength of a majority, the absence of a representative branch to filter the passions of that majority can result in despotism. In distinguishing between "popular government" and representative government, Madison stated:

> [T]he form of popular government . . . enables [the majority] to sacrifice to its ruling passion or interest both the public good and the rights of other citizens . . . From this view of the subject it may be concluded that a pure democracy . . . can admit of no cure for the mischiefs of faction . . . . Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible

> with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths . . . .

The Federalist No. 10, at 75-76 (James Madison) (Clinton Rossiter ed., 2003)

This principle is not just federal; it has long been recognized to be part of California's constitutional fabric. As this Court stated in 1874: "Our government is a representative republic, not a simple democracy. Whenever it shall be transformed into the latter – as we are taught by the examples of history – the tyranny of a changeable majority will soon drive honest men to seek refuge beneath the despotism of a single ruler." *Ex parte Wall*, 48 Cal. 279, 314 (1874).[10]

Of course, the initiative power does not inherently conflict with the above-described principle that legislatures must serve as a filter for the passions of the majorities. Indeed, the initiative power is generally consistent with our representative form of government precisely because it supplements, rather than obliterates, the role of the legislature. *See Amador*, 22 Cal. 3d at 227 (recognizing the need for state and local government to "continue to function through the traditional system of elected representation"); *Kadderly v. City of Portland*, 44 Or. 118, 145-46

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[10] One need look no further than the issue of lesbian and gay rights to confirm that the representative process serves as an effective filter against discrimination by intemperate majorities. *See, e.g.*, Donald P. Haider-Markel, Lose, *Win, or Draw?, a Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Research Q. 2, 304, 312-13 (June 2007) (demonstrating that most ballot initiatives pertaining to lesbian and gay issues result in losses for lesbians and gay men, and that with respect to proposals to deny rights, lesbians and gay men "do in fact fare better in representative democracy").

(1903) (holding that the initiative power is consistent with a republican form of government because "the people may exercise a legislative power, . . . but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed."). As we have shown, in the vast run of cases there is no collision between the two constitutional roles, because most initiative amendments seek to conform the Constitution to modern day issues of democratic governance, not to trample minority rights. *See supra* at pp. 20-21.

But in rare cases there will be such a collision, requiring the Court to harmonize competing constitutional principles. It would be truly remarkable to conclude that: (i) article XVIII carves out a role for legislative deliberation with respect to some constitutional changes; but (ii) it does not do so with respect to the kind of change that we have always understood to require, *more than any other*, deliberation in the legislative branch. Rather than depriving the legislature of its hallowed responsibility, the Court should harmonize the initiative power with article XVIII's insistence that certain measures be subject to greater deliberation by holding that, in the rare case where a political majority seeks to selectively deprive a constitutionally protected group of a fundamental right, such a proposal must undergo the rigors of the revision process rather than simply being enacted by majority vote.[11]

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[11] Both the Attorney General and Interveners suggest the revision inquiry depends, at least in part, on whether a measure would create "voter confusion," thereby necessitating greater deliberation. A.G. Ans. Br. at 51, Int. Br. at 5. However, that is not the test. If it were, the measure in *Raven* could not have been deemed a revision. After all, the voters are capable of understanding the question whether protections for criminal defendants should be limited to those contained in the United States Constitution. Rather, as discussed above, the need for legislative deliberation is at its

(continued on next page)

1. Interveners' Argument That Proposition 8 Cannot Be Deemed A Revision Without Engaging In Factual Speculation Improperly Narrows Existing Doctrine.

Interveners respond to all this by straining to minimize the nature of Proposition 8. In what seems like an attempt to reargue the *Marriage Cases*, they assert that Proposition 8 is only "about restoring and maintaining the traditional definition of marriage." Int. Br. at 16-17. The measure does not, Interveners insist, seek to deny basic rights to a vulnerable minority. *Id.*[12] Nor may the Court speculate, they argue, about what might happen in the future should Proposition 8 be allowed to stand. And even if one were to speculate, Interveners contend that political majorities are unlikely to deprive lesbians and gay men of any *other* fundamental rights – only the fundamental right to marry. In effect, their argument is: not to worry, this ticket is good for one ride only.

In support of this argument, Interveners rely heavily on this Court's statement that, for a measure to be deemed a revision, "it must *necessarily or inevitably appear from the face* of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution." *Legislature v. Eu*, 54 Cal. 3d 492, 510 (1991).

(footnote continued from previous page)
greatest when the majority seeks to deprive a suspect class of its fundamental rights.

[12] This characterization of Proposition 8 is difficult to swallow. If the voters enacted a measure providing that only males shall vote, would Interveners contend that such a measure merely "restores the traditional definition of suffrage"? Would they argue it was not intended to deny a certain group inalienable rights? Interveners' misleadingly benign characterization of Proposition 8 is grounded in their continued insistence that this Court's decision in the marriage cases was an illegitimate act by "four activist judges in San Francisco." Voter Guide 56.

However, Interveners misunderstand this test. As discussed above, a decision upholding Proposition 8 necessarily and inevitably creates a new constitutional rule that profoundly impacts the ordering of our democracy. Interveners have offered no explanation for how the California Constitution could be held to permit the voters to selectively deprive one suspect class of one fundamental right, without simultaneously creating a rule that the California Constitution permits the voters to selectively deny other rights from that group, or to selectively deny rights from *other* constitutionally protected suspect classes. Nor can they, because there simply is no limiting principle to the rule that would be created by a decision upholding Proposition 8.

As such, Proposition 8 stands in sharp contrast to the initiative measures this Court concluded were not revisions on the ground that a change in the governmental framework did not appear from the face of the measure. In those cases, the petitioners asked the Court to engage in *factual* speculation about how a narrow measure *might* lead to broader consequences. In *Eu*, for example, the petitioners argued that even though legislative term limits themselves did not alter the governmental structure, they would *lead to* such an alteration because the legislature would effectively lose its power. *Eu*, 54 Cal. 3d at 509-10. In *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 224-25 (1978), the petitioners argued that even if limitations on property taxation did not themselves alter the governmental structure, they would *cause* local governments ultimately to lose their home rule power. The Court in *Amador* and *Eu* declined to engage in such factual speculation, noting that petitioners' arguments were "dependent on a number of as yet unproved premises." *Eu*, 54 Cal. 3d at 509.

The conclusion that Proposition 8 is a revision depends on no unproved premise. No factual speculation is required to realize that, if the Court upholds Proposition 8 as a valid amendment, California will have a new rule of constitutional law that collides with our preexisting structure of government. True, no crystal ball can predict how impassioned majorities may take advantage of this rule in the future. The rule may or may not be used to single out members of a religious group that adheres to a faith thought to be anti-American. Or to single out people who hail from countries with which America is, or may someday be, at war. The rule may or may not be used to selectively deprive lesbians or gay men of other constitutional rights – such as the right to free speech or to own property – that were supposed to be inalienable. But the rule will exist immediately, and *the rule itself* is a structural change, even in the unlikely event an impassioned majority does not take advantage of it in some future circumstance.

The statement that a change in the governmental structure must "necessarily or inevitably appear from the face" of the initiative to be deemed a revision cannot possibly mean the Court must wear blinders and avoid assessing the *legal* consequences of a ruling upholding the measure. Imagine, for example, if the measure at issue in *Amador* had stripped municipalities of the power to constitute police departments – a quintessential home rule function. A ruling upholding such a measure would have set a precedent allowing the electorate, by initiative, to selectively strip local governments of their central home rule powers, in contravention of article XI, section 5. The Court could not have held, in such a circumstance, that the measure was not a revision because municipalities retained (for the time being) the ability to exercise the home

rule power in all other ways, *i.e.*, by constituting a fire department, by levying taxes, etc. Rather, the Court would have been compelled to strike down the measure on the ground that to uphold it would create a new constitutional rule inconsistent with the well-established home rule power already set forth in the Constitution.

To use another example, imagine that in *Mulkey* the petitioners had not argued that the discriminatory housing measure violated federal equal protection, but had only argued that it constituted a revision. It is difficult to imagine the Court would have adopted Interveners' "ticket good for one ride only" approach, upholding the measure on the ground that it "merely" constitutionalized discrimination against one group (racial minorities) in one discrete area (housing). Rather, the Court would have been compelled to recognize that upholding the housing measure as a valid amendment would have created a rule that dramatically altered the constitutional landscape by allowing bare majorities to discriminate against unpopular groups, in any number of areas, without apparent limitation. Even if no future forms of discrimination were on the immediate horizon, the constitutional change effectuated by a measure like the one in *Mulkey* would have been significant enough to constitute a revision.

Indeed, in several ways, a ruling upholding Proposition 8 would cause a more serious constitutional disruption than a ruling upholding the initiative in *Mulkey*. The housing measure sanctioned private discrimination, while Proposition 8 actually *forces the government* to discriminate against same-sex couples by denying them marriage licenses, and upholding it leads to a rule that the California Constitution allows political majorities to force the government to discriminate in any area against any group. And Proposition 8 purports to strip the judiciary of the

ability to protect the rights of minorities in precisely the area the California Constitution holds that this ability is needed most – where the federal Constitution has not yet conferred adequate protection upon a minority group that has historically been the victim of systematic governmental repression.

In sum, although the Court should not engage in factual speculation about the potential impact of a measure, neither should the Court ignore the new constitutional rule that would be created by upholding the measure as a valid amendment and the relationship of such a rule to our existing constitutional structure.

2. Interveners' Attempt To Minimize The Impact Of Proposition 8 With Reference To The Federal Constitution Is Fundamentally Misguided.

Interveners also insist that the consequences of deeming Proposition 8 an amendment are minimal, because "the United States Constitution continues to protect the fundamental rights of all Californians." Int. Br. at 29. This makes no sense. While it is true that the United States Constitution continues to protect fundamental rights conferred by *that document*, Californians also have fundamental rights that are protected by *their own* Constitution. Interveners' assertion highlights just how flawed their argument is: it rests on the assumption that the California Constitution confers no fundamental rights not already conferred by federal law. In reality, our Constitution provides that "[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const. art. I, § 24. And as this Court has repeatedly made clear, "[t]his statement extends to all such rights . . . [f]or the California Constitution is now, and has always been, a 'document of independent force and effect *particularly in the area of individual*

liberties.'" *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850, 862-63 (2007) (quoting *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 489-90 (2000)) (emphasis added).

Interveners' position is also at odds with this Court's revision jurisprudence. The measure struck down by the Court in *Raven* was a revision precisely because it forced California citizens, in the area of criminal law, to rest the protection of their rights solely in the hands of the federal Constitution. As such, the measure "not only unduly restrict[ed] judicial power, but [did] so in a way which severely limits the independent force and effect of the California Constitution." 52 Cal. 3d at 353. From this perspective, Proposition 8 is far worse than the measure at issue in *Raven*. The rule created by a holding that Proposition 8 is a valid amendment would not be limited to one discrete area, such as criminal law. It would stand for the proposition that, in *all* areas, Californians may no longer rely on their own Constitution to protect rights heretofore thought to be inalienable. They must hope federal law will do the job.

At bottom, far from interpreting the California Constitution as a document of independent force, Interveners are asking the Court to avert its eyes from the great blemish Proposition 8 would attach to it on the ground that, as a practical matter, it is no big deal.

B. Proposition 8 Is A Revision Because It Diminishes The Separation Of Powers Protection Provided By The California Constitution.

This case presents a further question not answered by the nine existing revision cases: if a proposed measure would undercut the fundamental separation of powers protection embedded in the California Constitution, must *that* measure be enacted through the revision process? The answer is yes, because that is the only way to prevent a collision

between the amendment power conferred by article XVIII, section 3 and the separation of powers protections provided by article III.

First, the separation of powers clause, more than any other constitutional provision, defines the basic structure of our government. Accordingly, any measure that runs afoul of the separation of powers doctrine, by definition, alters that basic governmental structure and must be deemed a revision. Second, for reasons similar to those discussed above, even if an individual separation of powers infringement created by an initiative measure might not be considered to have broad structural consequences when viewed through the narrowest of possible lenses, a ruling allowing such infringements to be accomplished by amendment creates a new constitutional rule that gives a majority of the electorate control over the separation of powers, thereby allowing that fundamental protection to be chipped away. There is no question that Proposition 8 infringes on a core function of the California judiciary, and Interveners' argument to the contrary reflects a fundamental misunderstanding of the role of the courts.

1. Any Separation Of Powers Infringement Fundamentally Alters The Governmental Structure And Therefore Constitutes A Revision.

The separation of powers principle is "enshrined in the Constitution and fundamental to the preservation of our civil liberties . . ." *Solberg v. Superior Court*, 19 Cal. 3d 182, 191 (1977). A separation of powers violation occurs whenever one branch impermissibly intrudes upon the "core zone" of the constitutionally prescribed powers or functions of another branch. *See Marine Forests Society v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 45-46 (2005).

It bears repeating that when the electorate attempts to amend the Constitution by initiative, it has "exercised its constitutional authority as a legislative entity." *Professional Engineers*, 40 Cal. 4th at 1045. Accordingly, when an initiative amendment intrudes upon the core powers or function of the judicial branch, that is a separation of powers violation by the electorate acting in a legislative capacity. *See Marine Forests*, 36 Cal. 4th at 35. Thus, by definition, the electorate exercising the initiative power may not intrude upon the core functions of the judicial branch. Indeed, "[t]he founders of our republic viewed the legislature as the branch most likely to encroach upon the power of the other branches" and, for this very reason, included the separation of powers clause within the Constitution. *Carmel Valley Fire Prot. Dist. v. State of California*, 25 Cal. 4th 287, 298 (2001). Thus, any constitutional measure that would otherwise violate the separation of powers doctrine may only be accomplished by revision because to allow the electorate to intrude upon the core zone of judicial power would alter article III – the foundation upon which our system of government rests.

2. Even If A Separation Of Powers Infringement Could Be Viewed Narrowly, It Still Must Be Deemed A Revision.

As discussed above, in arguing that Proposition 8 is not a revision, Interveners rely heavily on the assertion that the measure does not, on its face, necessarily alter the structure of government. In the separation of powers context, they similarly argue that reversal by the electorate of one judicial ruling upholding the fundamental rights of a suspect class does not deprive the courts of the ability to protect minority rights in future instances. However, this narrow argument is even more flawed in the separation of powers context. A conclusion that a separation of powers

violation may be accomplished by amendment would establish a new constitutional rule that allows the governmental structure protected by article III to be chipped away in a piecemeal fashion.

Indeed, existing separation of powers case law makes clear that "isolated" separation of powers violations are no more permissible than broad or systematic ones. For example, it is well settled that "a court may neither directly compel the legislature to appropriate funds nor order the payment of funds that have not been appropriated by the legislature." *Mandel v. Myers*, 29 Cal. 3d 531, 539 (1981). Even if the appropriation order is for a very small amount (say, one dollar), and even if it is limited to a very specific area (say, spending on state parks), the order indisputably violates the separation of powers doctrine. Similarly, the legislature may not appoint a confidential aide to the Governor, even if it is only one aide who is to assist the Governor in but one part of his core executive functions. *Marine Forests*, 36 Cal. 4th at 46. Nor may the legislature disturb a final judgment of the courts, even if it is in a very limited area of the law; indeed, even if it involves just one case. *People v. Bunn*, 27 Cal. 4th 1, 17-25 (2002). None of these acts would fundamentally alter the structure of government when viewed out of context and in isolation. But each of them indisputably constitutes a violation of the separation of powers doctrine.

The reason for this lies in the importance of article III to our constitutional system. The separation of powers principle is too critical to the preservation of the rule of law to permit its erosion on a piecemeal basis. Accordingly, as this Court stated long ago, "[i]f the power of the Legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be *once* recognized, there will be no limit to

the dependence of the latter." *Houston v. Williams*, 13 Cal. 24, 25 (1859) (emphasis added). In short, if a measure infringes upon a core zone of judicial power, it violates Article III regardless of whether its consequences, viewed in isolation, are great or narrow.

3. Proposition 8 Infringes On The Most Central, Core Function Of The California Judiciary.

There is no question that Proposition 8 infringes upon a core zone of judicial power, *i.e.*, the power to have the final word on the inalienable rights of unpopular minority groups. As Justice Kennard stated in the *Marriage Cases*:

> In holding today that the right to marry guaranteed by the state Constitution may not be withheld from anyone on the ground of sexual orientation, this court discharges its gravest and most important responsibility under our constitutional form of government. There is a reason why the words "Equal Justice Under Law" are inscribed above the entrance to the courthouse of the United States Supreme Court. Both the federal and the state Constitutions guarantee to all the "equal protection of the laws" . . . and it is the particular responsibility of the judiciary to enforce those guarantees. The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection.

43 Cal. 4th at 859-60 (internal citations omitted). And as the Court stated in *Bixby*, "[t]he separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch . . . . Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the

light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." 4 Cal. 3d at 141 (internal citations omitted). Through Proposition 8, a majority of the electorate has infringed upon this Court's "gravest and most important responsibility" by attempting to wrest from it the final word on the fundamental rights of lesbians and gay men.[13]

4. Interveners Fundamentally Misunderstand The Role Of The California Judiciary.

Interveners respond that because Proposition 8 purports to amend the Constitution rather than merely enact a statute, none of this matters. They argue that: (1) the power of the judiciary is conferred by the Constitution; (2) the judiciary may therefore only protect the fundamental rights of unpopular minorities to the extent permitted by the Constitution; (3) the California Constitution now precludes the judiciary from protecting same-sex couples from being denied the right to marry; and therefore (4) the protection of lesbians and gay men from marriage discrimination does not fall within the Court's core power. The fundamental flaw in this argument is that it *presumes* that Proposition 8 validly amends the California Constitution; it does not provide a real answer to *whether* the measure is a valid amendment rather than a revision. "Nothing becomes law simply and solely because men, who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode appointed

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[13] As discussed in Subsection D below, the Court's decision in *People v. Frierson*, 25 Cal. 3d 142 (1979), does not stand for the proposition that protecting the fundamental rights of suspect classes is not a core function – indeed the core function – of the judiciary. *Frierson* did not involve selective denial of a fundamental right; it involved the majority's determination of the scope of a constitutional limitation that itself must be measured largely with reference to the views of society.

by the instrument which invests them with power . . ." *AFL-CIO v. Eu*, 36 Cal. 3d 687, 709 n.19 (1984) (quoting *Mullan v. State*, 114 Cal. 578, 585 (1896)). And to determine whether Proposition 8 has been enacted in the "mode appointed by the instrument" that gives the electorate the power to amend the Constitution, the Court must harmonize the fundamental, well-established separation of powers doctrine enshrined in Article III with Article XVIII's distinction between a revision and an amendment.

Such harmonization may only be accomplished by concluding that measures which diminish our separation of powers protection fall outside the initiative power. If a shift in power runs afoul of the separation of powers doctrine by infringing upon a core power of one of the branches, it may not occur through amendment even if, viewed through extremely narrow lenses, it would not fundamentally alter the governmental structure. Because such measures undercut a protection that is "fundamental to the preservation of our civil liberties," *Solberg*, 19 Cal. 3d at 191, they must be enacted through the more deliberative revision process.

II. THE ATTORNEY GENERAL'S ARGUMENT DEMONSTRATES THAT PROPOSITION 8 MAY BE DEEMED A REVISION APART FROM ITS STRUCTURAL IMPLICATIONS.

A. Measures That Seek To Deny Fundamental Rights To Suspect Classes Must, At A Minimum, Be Enacted Through The Revision Process.

The Attorney General argues that, irrespective of the revision doctrine, measures that selectively deny inalienable rights to suspect classes presumptively fall outside the scope of the amendment power. He also questions whether such measures could be adopted through the revision process. We agree with the Attorney General, and share his position that because Proposition 8 is clearly an invalid amendment, there is no need to determine whether it theoretically could constitute a valid revision.

However, if the Court treats this case in the manner framed by the first question in its Order to Show Cause ("Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?"), we believe the Attorney General's argument demonstrates why the answer is yes, regardless of whether the measure is deemed to have significant structural consequences. The revision/amendment distinction is implicated when a measure alters the governmental structure that was designed in part to protect fundamental human rights, but also when a measure directly attacks those rights.

As a preliminary matter, Interveners will no doubt object on the ground that existing revision case law has not identified a rights-based revision. That is true, but it is hardly surprising. Although the revision doctrine is old, stretching back to 1894, it is hardly "lavish," as Interveners assert. Int. Br. at 5 (ruling striking down Proposition 8 would "tear asunder a lavish body of jurisprudence built up over the decades of this Court's service to the people"). In fact, in the 114 years of the doctrine's existence, this Court has conducted the revision/amendment inquiry all of nine times. There is no basis to suggest that the Court, in these nine cases, has confronted every type of measure that might require greater deliberation than is allowed in a political campaign. Indeed, perhaps the Court recognized that not all potential revisions had been considered when it described a qualitative revision this way: "a qualitative revision *includes* [but is apparently not limited to] one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches." *Eu*, 54 Cal. 3d at 509 (emphasis added).

As the Attorney General has noted, the Constitution protects certain rights – including the rights to liberty and privacy that the fundamental right to marry embodies – as inalienable. *See* Cal. Const. art. I, sec. 1. He further notes, correctly, that inalienable rights were placed in the Constitution because they were thought to be guaranteed by natural law. However, the original reason for their insertion does not matter for present purposes. What matters now is that these rights are protected by the California Constitution as inalienable. This cannot be ignored. *See Marriage Cases*, 43 Cal. 4th at 810.

Of course, not all matters touched by these inalienable rights provisions automatically raise a constitutional red flag. The provisions are intentionally left open-ended, with the understanding that future generations would expound the more specific and more limited fundamental interests they protect. These fundamental interests are limited in the sense that they must be "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (internal quotations omitted).

But the reason why fundamental rights are limited in number is the same reason why they hold a special place in our constitutional hierarchy – their exercise is essential to our way of life. And the right to marry is indisputably one of these. That is why Justice Carter said California's ban on interracial marriage "violate[s] the very premise on which this country and its Constitution were built, the very ideas embodied in the Declaration of Independence, the very issue over which the Revolutionary War, the Civil War, and the Second World War were fought, and the spirit in which the Constitution must be interpreted . . . ." *Perez*, 32 Cal. 2d at 740 (Carter,

J., concurring). Given the importance of our basic, fundamental human rights, it would make little sense to conclude that the deprivation of these rights does not implicate the revision/amendment distinction set forth in Article XVIII, while arguably less important structural issues do.

The Court need not identify all the instances in which an attempt by the political majority to deny basic, fundamental rights should be subject to the revision process. Because here, it is not even a close call. Proposition 8 does not "merely" seek to deny fundamental rights; it deprives a suspect class of fundamental rights. As such, it flouts the equality principle, which as discussed at pp. 13-24, *supra,* is a central, if not *the* central, foundational principle of our constitutional democracy. And it infringes the principle at its very core – the protection of unpopular groups, like lesbians and gay men, that have been subjected to a history of irrational state-sponsored persecution and societal discrimination. Accordingly, the selective deprivation of fundamental rights from a suspect class is an act of the highest constitutional magnitude – it strikes at the core of the California Constitution. To hold that it may occur through the initiative process eviscerates the concept of equal protection altogether, leaving nobody – not even those in need of the most heightened constitutional protection – safe from the whims of an intemperate majority.

> [F]or the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect.

Billings v. Hall, 7 Cal. 1, 17 (1857) (Burnett, J., concurring).

As this Court stated in its earliest case discussing the revision/amendment distinction, the Constitution as a whole, and "the underlying principles upon which it rests" were intended to be "of a permanent and abiding nature." *Livermore*, 102 Cal. at 118-19. An amendment is an "addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Id.* A change that selectively denies suspect classes of their fundamental rights would clearly compromise "the underlying principles upon which [the Constitution] rests." While this Court has not yet had occasion to consider a qualitative revision of this latter kind, that should not deter the Court from recognizing it now.

B. The Concerns Expressed By The Attorney General And Interveners About The Implications Of A Holding That Proposition 8 Constitutes A Revision Are Misplaced.

The Attorney General appears to place the above discussion outside the revision/amendment context for fear of distorting the doctrine. He states, "one may legitimately ask how the rule advocated by petitioners would be applied to future proposed initiative measures." A.G. Ans. Br. at 51. That is fair. But the questions the Attorney General proceeds to ask demonstrate why a ruling that Proposition 8 constitutes a revision would neither contort the doctrine nor threaten future initiative measures in the vast run of cases.

The Attorney General first asks whether Proposition 98, which prescribes a minimum level of education spending, would constitute a revision. And he asks whether, if the voters wished to repeal Proposition 98, our argument would prohibit them from doing so by amendment. A.G. Ans. at 52. The answer is no. A repeal of Proposition 98 would apply to everyone; it would not involve to the kind of selective deprivation

Proposition 8 would accomplish. Further, setting education spending is a quintessentially legislative function. As discussed at p. 18, *supra*, when the electorate amends the Constitution by initiative, it acts in a legislative capacity. Accordingly, a determination by the electorate about education spending does not alter our constitutional scheme; it *reflects* our constitutional scheme.

The Attorney General next asks whether Proposition 209, which prohibits affirmative action, would constitute a revision under our approach. Again, the answer is no. Proposition 209 does not require discrimination, it prohibits discrimination. Although many people strongly disagree about the merits of affirmative action, there is little disagreement that it is "discriminatory," at least in the sense that it confers benefits on some people and not others even when it is used to remedy past governmental discrimination. Even so, because other remedies remain available, the right to be free of governmental discrimination remains intact. And, even if one were to argue that there is a fundamental right to affirmative action, Proposition 209 eliminates that right globally for everyone, whereas Proposition 8 deprives only a suspect class of its fundamental right. Nothing in our argument would suggest that measures like Proposition 209 should be treated as revisions.

Interveners raise similar concerns. Primarily, they argue that if Proposition 8 were a revision, the voters could never have amended the Constitution to restore the death penalty. *See People v. Frierson*, 25 Cal. 3d 142 (1979). And they make much of the fact that the amendment to restore the death penalty not only declared that it is not cruel or unusual, but it also precluded the Court from striking it down on any constitutional grounds, including equal protection. Int. Br. at 19-21. But core equality

concerns were not implicated by that amendment. It restored the death penalty for everyone. As for its application to individuals, the Court preserved the power to ensure that the death penalty would not be applied in violation of the equality principle: "we retain broad powers of judicial review of death sentences to . . . safeguard against arbitrary or disproportionate treatment." *Frierson*, 25 Cal. 3d at 187. Accordingly, while *Frierson* stands for the proposition that a majority of the electorate may shape the general application of the cruel and unusual punishment clause according to its judgment, it cannot seriously be contended that the electorate could have amended the Constitution to selectively reinstate the death penalty for a suspect class alone.[14]

In short, a conclusion that Proposition 8 constitutes a revision does not disturb the power of the people to amend the Constitution. In the vast run of cases, initiative amendments do not even come close to depriving suspect classes of their fundamental rights. And the amendment power has *never* been used successfully to accomplish this goal. Accordingly, a ruling that Proposition 8 must be accomplished by revision leaves the people's initiative power in the same state as before.

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[14] Interveners contend our reliance on the importance of the equality principle proves too much, because according to them "all constitutional rights are counter-majoritarian." Int. Br. at 22. However, *Frierson* proves this is not so. The cruel and unusual punishment clause largely is a *reflection* of majoritarian views. *Frierson*, 25 Cal. 3d at 187. Furthermore, measures that affect inalienable rights such as freedom of speech or liberty only sometimes implicate the equality principle. If a liberty interest such as the fundamental right to marry were eliminated across the board by a measure that removed government from the business of providing marriage licenses, that would not implicate the equality principle. But the elimination of the right to marry for a minority group does implicate the equality principle.

III. PROPOSITION 8 DOES NOT APPLY RETROACTIVELY.

Only the Interveners contend that Proposition 8 impairs the rights of same-sex couples who got married before its adoption. None of the other parties to this proceeding does, not even the state officials who are Respondents in this case.

The Individual Petitioners in this case, who all married before the November 4, 2008 election, have a vital interest in this issue. They are: Helen Zia and her wife Lia Shigemura; Ed Swanson and his husband Paul Herman; retired Naval Commander Zoe Dunning and her wife, former Navy Petty Officer 3rd Class Pam Grey; Marian Martino and her wife Joanna Cusenza; Bradley Akin and his husband Paul Hill; Emily Griffen and her wife Sage Andersen; and Suwanna Kerdkaew and her wife Tina Yun. Exhibits in Support of Reply of City and County of San Francisco, *et al.* ("Reply Ex."), 1-7. Like most married couples, each has unique and profoundly personal reasons why their marriage is important to them. For Helen and Lia, marriage solidified the bonds between their extended families. Reply Ex. 1 ¶¶3-6. For Ed and Paul, marriage means that their six-year-old twin daughters Liza and Kate will know that their family is as legitimate as any other. Reply Ex. 2 ¶9. For Suwanna, teased and bullied as a child because her parents were interracial, marriage to Tina represents a chance that their daughter may be spared such hurtful prejudice. Reply Ex. 7 ¶¶7-8. For Marion and Joanna, who wed after twenty-eight years on the fifty-fifth wedding anniversary of Marion's own parents, marriage gives them language that captures and expresses the lifelong commitment they have made to each other. Reply Ex. 4 ¶¶1, 3-4. If this Court were to rule that the Individual Petitioners' marriages have been abolished, it would touch each of their lives in different but equally painful ways. Reply Ex. 1

(Zia Declaration) ¶9; Ex. 2 (Swanson Declaration) ¶¶8-12; Ex. 3 (Dunning Declaration) ¶10; Ex. 4 (Martino Declaration) ¶4; Ex. 5 (Akin Declaration) ¶¶9-11; Ex. 6 (Griffen Declaration) ¶10; Ex. 7 (Kerdkaew Declaration) ¶¶6-10. And, of course, they are not alone. *See, e.g.*, Reply Ex. 8 (Carr Declaration) ¶7; Ex. 9 (Goodall Declaration) ¶5; Ex. 10 (Rodriguez Declaration) ¶6 Ex. 11 (Jadallah Declaration) ¶¶8-9; Ex. 12 (Villasenor Declaration) ¶4. Indeed, it would be no exaggeration to say that such a ruling would be profoundly distressing to the many thousands of same-sex couples who married before the November 4 election. The painful and widespread impact of abolishing thousands of lawful marriages sheds light on the importance of the principles, discussed below, that govern here: namely, that new laws do not operate retroactively unless those who enacted them were given *clear* notice that the effect of their vote would be to reach back into the past and upset settled expectations.

The Court surely would have expected that any party advocating retroactive effect for Proposition 8 would identify the established legal standards for determining whether any law is retroactive, and then explain how Proposition 8 meets that test for retroactivity. Despite the professional and academic credentials of Interveners' counsel, Interveners' Opposition Brief fails to set forth, or even allude to, the standards for determining whether a law should be given retroactive or prospective-only effect. We begin by remedying Interveners' telling omission, for once the standard is identified and applied to Proposition 8, this is not a close case.

"Generally, statutes operate prospectively only." *McClung v. Employment Dev. Dep't*, 34 Cal. 4th 467, 475 (2004) (citation omitted). New laws are presumed to "operate prospectively absent a clear indication the voters or the Legislature intended otherwise." *Californians for*

Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 230 (2006). While "no talismanic word or phrase is required to establish retroactivity" (*Myers v. Philip Morris Cos.*, 28 Cal. 4th 828, 843 (2002) (citation omitted)), the presumption is so strong that to defeat it, "the words used [must be] so clear, strong and imperative that no other meaning can be annexed to them . . . ." *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 980 (1997) (citation omitted). "[I]n modern times, [the Court] ha[s] been cautious not to infer the voters' or the Legislature's intent on the subject of prospective versus retrospective operation from vague phrases and broad, general language." *Californians for Disability Rights*, 39 Cal. 4th at 229 (citations and internal quotation marks omitted); *Myers*, 28 Cal. 4th at 841 ("statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective") (citation omitted). "Requiring clear intent assures that [the electorate] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *McClung*, 34 Cal. 4th at 476 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994)). As the United States Supreme Court said of the counterpart federal rule, this "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. It applies equally to constitutional provisions. *See Rosasco v. Comm'n on Judicial Performance*, 82 Cal. App. 4th 315, 321-22 & n.3 (2000) (presumption against retroactivity not limited to non-constitutional ballot measures).

To determine whether Proposition 8 invalidates marriages performed prior to its adoption, the Court will first determine whether applying the measure to such marriages constitutes retroactive application. *See*

Californians for Disability Rights, 39 Cal. 4th at 230. If the answer to that question is "yes," it will determine whether the voters intended retroactive application. *See Myers*, 28 Cal. 4th at 840; *Yoshioka*, 58 Cal. App. 4th at 979. As we now show, these questions – which the Interveners fail to address – are not close.

A. Invalidating Marriages Of Same-Sex Couples Performed Before The Election Would Involve Retroactive Application Of Proposition 8.

The first question is whether applying Proposition 8 to invalidate marriages undertaken prior to its enactment constitutes retroactive application. *See Californians for Disability Rights*, 39 Cal. 4th at 230. That question answers itself. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Myers*, 28 Cal. 4th at 839 (citation and internal quotation marks omitted). Therefore, this "[C]ourt must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70. Applying Proposition 8 to invalidate marriages that were completed prior to its effective date would do precisely that.[15]

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[15]The last "act or event" required for a marriage is solemnization (followed by official recordation). These acts took place – and thus the marriages began – before Proposition 8's effective date. *See In re Marriage Cases*, 43 Cal. 4th 757, 805 n.24 (2008) ("to marry, a couple must obtain a marriage license and certificate of registry of marriage from the county clerk, have the marriage solemnized by an authorized individual, and return the marriage license and certificate of registry to the county recorder of the county in which the license was issued, who keeps a copy of the certificate of registry of marriage and transmits the original certificate to the State Registrar of Vital Statistics") (citing Fam. Code §§306, 359; Health & Safety Code §§102285, 102330, 102355); Fam. Code §300 (consent

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In the period between the effective date of this Court's ruling in *In re Marriage Cases*, 43 Cal. 4th 757 (2008), and the enactment of Proposition 8, California recognized marriages of same-sex couples as lawful, valid and constitutionally protected – equal in status and stature to marriages of opposite-sex couples. Those marriages triggered an array of reciprocal legal rights and duties. If Proposition 8 invalidated marriages performed during that period, the State would be withdrawing its prior recognition (and licensing) of those marriages – with all the legal, economic, personal and psychological consequences that that implies. As a result, married couples would lose the reciprocal rights and benefits conferred by their state-sanctioned marriages. Consequently, applying Proposition 8 in that manner would be retroactive.

California courts have consistently found laws that would change the legal effect of past conduct to be retrospective. *See McClung*, 34 Cal. 4th at 472-75 (statutory amendment that would impose liability for harassment occurring before amendment's effective date); *Myers*, 28 Cal. 4th at 840 (new law that would impose liability on tobacco companies for selling tobacco products as applied to period in which tobacco companies previously enjoyed statutory immunity); *Aetna Cas. & Sur. Co. v. Indus. Accident Comm'n*, 30 Cal. 2d 388, 391-92 (1947) (law increasing workers compensation benefits as applied to injuries that took place before law changed); *Yoshioka*, 58 Cal. App. 4th at 979-80 (initiative that prohibited

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(footnote continued from previous page)
"followed by the issuance of a license and solemnization" constitutes marriage); Fam. Code §306 (failure by a nonparty to the marriage to authenticate and return the certificate of registry of marriage "does not invalidate the marriage").

uninsured motorists from collecting noneconomic damages as applied to accidents occurring prior to the initiative).

Applying Proposition 8 to existing marriages would also take away vested, fundamental rights acquired under then-existing law. The Court previously found that "the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution." *In re Marriage Cases*, 43 Cal. 4th at 809. The couples who married under then-existing law exercised their fundamental right to marry. Invalidating those marriages would take away the State's former "assurance to each member of the relationship that the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship rests." *Id.* at 820. In addition, the official recognition of marriage is a fundamental aspect of the right to marry. *See id.* at 816-18. Once these couples lawfully exercised their right to marry, their right to official recognition of their marriages was established; Proposition 8 would strip them of that right.

Moreover, those married same-sex couples, such as Petitioners Zoe Dunning and Pam Grey, who were not registered as domestic partners when this Court decided the *Marriage Cases*[16] – and any who dissolved their partnerships because they married – would lose *all* of the rights their marriages bestowed, including joint filing of tax returns; property tax exemptions; health, pension, welfare and other benefits provided to spouses of government employees; paid or unpaid family leave provided for the care of a spouse; the privileged nature of confidential communications between spouses; and the spouse's authority to make health care decisions

[16]*See* Reply Ex. 3 (Dunning Declaration) ¶9.

for an incapacitated spouse. Moreover, any property acquired while their marriages were recognized might no longer be defined as community property.

Even the Interveners tacitly concede that they are claiming that Proposition 8 operates retroactively. They contend that same-sex couples who married before the election were legally married for a time, but that their marriages were dissolved the day after the election. Int. Br. at 40-41 ("In sum, regardless of whether Proposition 8 voids interim marriages *ab initio*, there is no support for the notion that interim marriages are now valid or recognized under California law."). In effect, the Interveners argue that Proposition 8 effectuated a sweeping, across-the-board legislative divorce, against the will of every same-sex couple married under California law. They then suggest that specific issues relating to the dissolution of these marriages should be resolved either by the Legislature or by the courts on a case-by-case basis. *See id.* at 41-42. But, of course, if Proposition 8 did not retroactively abolish these marriages – by extinguishing their legal *consequences* – then there would be no need for resort to principles of equity or to a legislative solution; in that case, all of these couples would enjoy *marital* rights and owe *marital* obligations to one another arising from the period prior to the election. So the Interveners' position necessarily is that Proposition 8 applies retroactively.[17]

For all of these reasons, application of Proposition 8 to existing marriages would be retroactive – and harshly so.

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[17]We do not for a moment question that principles of equity would apply to the rights and obligations of lawfully married same-sex couples if Proposition 8 *were* clearly intended to abolish their marriages. But for the many reasons explained in the text, it does not have that effect.

B. There Is No Clear Evidence That The Voters Intended Proposition 8 To Invalidate Marriages Undertaken Before The Election.

Because there is no clear indication that Proposition 8's drafters or the voters intended that it operate to invalidate existing marriages, Proposition 8 applies prospectively only.

1. The Text Of Proposition 8 Does Not Address The Issue Of Retroactivity.

The interpretational rules applicable to the issue of retroactivity, summarized above, are well known and readily available to lawyers who undertake to draft an initiative measure. Yet the text of Proposition 8 is utterly silent on the issue of retroactivity. It provides, in its entirety: "Only marriage between a man and a woman is valid or recognized in California." In contrast, when drafters of other ballot initiatives have intended the laws to apply retrospectively, they have said so, using clear language. *See, e.g.*, *Good v. Superior Court*, 158 Cal. App. 4th 1494, 1504, 1507 (2008) (text of Proposition 69 stated that "[s]ubdivision (a) and all of its paragraphs shall have retroactive application" and made subdivision (a) applicable "regardless of when the person was convicted of the qualifying offense"); *Jenkins v. County of Los Angeles*, 74 Cal. App. 4th 524, 536 (1999) (text of Proposition 213 stated that the "provision[] shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997").

Interveners mistakenly stress Proposition 8's present tense phrasing: "is valid or recognized." Int. Br. at 37.[18] But those words do not clearly indicate an intent that Proposition 8 would apply retroactively. They are

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[18]They also claim that Proposition 8's "plain language" encompasses polygamous marriages. Int. Br. at 37. We express no opinion on that question, which is irrelevant.

not "so clear, strong and imperative that no other meaning can be annexed to them." *Yoshioka*, 58 Cal. App. 4th at 980 (citation omitted). For example, the statute in *McClung* that the Court held was not intended to be retroactive stated only that "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee . . . ." 34 Cal. 4th at 471. Similarly, the statute construed in *Myers* stated that "there exists no statutory bar" for claims by smokers "who have suffered or incurred injuries" caused by tobacco products. 28 Cal. 4th at 842 (emphases omitted). While these statutes were phrased in the present tense (*see McClung* ("is personally liable"); *Myers* ("there exists no statutory bar"), the Court in each case found nothing in the text to overcome the "strong presumption against retroactivity." *McClung*, 34 Cal. 4th at 475; *Myers*, 28 Cal. 4th at 843. Indeed, the "presumption against retroactive application of a statute . . . would be meaningless if [such] vague phrases . . . were considered sufficient to satisfy the test." *Myers*, 28 Cal. 4th at 843.

Ignoring these authorities and the principles they embody, Interveners instead analogize to a couple who married out-of-state and then moved to California after the election. *See* Int. Br. at 37-38. The analogy is inapt. We agree that, under the plain language of Proposition 8, California would not recognize such a marriage. But that sheds no light on whether Proposition 8 is clearly intended to abolish the Individual Petitioners' marriages and the marriages of the many other same-sex couples like them who married in California before the election. Unlike these couples – whose marriages were licensed, sanctioned and blessed under California law – the couple hypothesized by Interveners will not have accrued any rights or benefits under California law prior to the election.

Therefore, the scenario hypothesized by Interveners poses no retroactivity issue.

Given the well-known presumption against retroactive application, Proposition 8's silence as to its potential retroactive application is telling.[19] The drafters of Proposition 8 knew when they authored and submitted the initiative that marriages of same-sex couples might be performed in California before the November 2008 election. The San Francisco Superior Court had held that the ban on marriage of same-sex couples was unconstitutional in 2005, and this Court granted review in the *Marriage Cases* on December 20, 2006. The proponents of Proposition 8 had ample time to contemplate the significant possibility that this Court would agree with the Superior Court and invalidate the ban: they did not submit their proposed initiative to the Attorney General for the preparation of a title and summary until May 25, 2007. So when Proposition 8 was drafted and submitted to the Attorney General, and long before any signatures were gathered, it was known that the Court might strike down California's ban on marriage by same-sex couples. (And, as discussed below, by the time the proponents' arguments in favor of Proposition 8 were submitted to the Secretary of State for inclusion in the ballot pamphlet, the opinion in the

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[19]The drafters of Proposition 8 are presumed to have been aware of the decisions requiring a clear statement of intent that a new law be retroactive. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1194 (1988) ("The drafters of the initiative measure in question, although presumably aware of this familiar legal precept [the presumption against retroactivity], did not include any language in the initiative indicating that the measure was to apply retroactively"). The Interveners are wrong to suggest that Proposition 8 must be given retroactive effect because it contains "no conditional clauses, exceptions, exemptions, or exclusions." Int. Br. at 37. To the contrary, Proposition 8's "brevity" and "plain language" are the very reason it should be given prospective-only effect.

Marriage Cases was nearly two months old.) In fact, Interveners admit that Proposition 8's "Official Proponents began the legal process of proposing an initiative amendment (ultimately Proposition 8)" because they were "[a]nticipating the possibility that the *Marriage Cases* could result in Proposition 22 being invalidated." Int. Br. at 2; *see also id.* at 39-40.

Indeed, since Proposition 8 does nothing more than transfer the language of Proposition 22 from the statute books to the Constitution,[20] its only apparent purpose was to overturn a potential future decision by this Court upholding the right of same-sex couples to marry. It would have been easy enough to include an express, clear statement of retroactivity. Of course, had such a provision been included in the text, the harsh effects of retroactive application would have been injected into the campaign for and against Proposition 8, and would have furnished opponents with strong arguments appealing to the voters' sense of fairness. Either the drafters did not intend Proposition 8 to apply retroactively, or their efforts lacked the minimal candor that the initiative process requires. "Since the drafters declined to insert such a provision in the proposition – perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision – it would appear improper for this [C]ourt to read a retroactivity clause into the enactment at this juncture." *Evangelatos*, 44 Cal. 3d at 1212.

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[20]Proposition 22, an initiative statute approved by the voters at the March 7, 2000 primary election, added Section 308.5 to the Family Code and provided: "Only marriage between a man and a woman is valid or recognized in California." *In re Marriage Cases*, 43 Cal. 4th at 796.

2. Proposition 8's Ballot Pamphlet Materials Do Not Clearly Indicate An Intent To Apply Proposition 8 Retroactively.

"California courts comply with the legal principle that unless there is an express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature must have intended a retroactive application." *Myers*, 28 Cal. 4th at 841 (citation, internal quotation marks and alterations omitted; emphases in original); *McClung*, 34 Cal. 4th at 475 (other sources must "provide a *clear and unavoidable* implication" of retroactive intent) (citation omitted; emphasis added). For an initiative, the relevant extrinsic sources are "the analyses and arguments contained in the official ballot pamphlet." *People v. Litmon*, 162 Cal. App. 4th 383, 407-08 (2008). The November 2008 ballot pamphlet was prepared *after* this Court's decision, on May 15, in the *Marriage Cases*. (The proponents' arguments were due on July 8, 2008.) As we now show, even though it was clear that the effect of Proposition 8 would be to overturn the result in those cases, the ballot pamphlet did not provide a clear and unavoidable implication that the voters intended Proposition 8 to apply retroactively. Rather, with the exception of one ambiguous temporal reference buried in a rebuttal argument at the end of the Proposition 8 materials, the ballot pamphlet *was silent on the subject of retroactivity*. Moreover, many portions of the ballot pamphlet – especially those that bear the state's stamp of impartiality and accuracy – implied an intent to apply Proposition 8 prospectively only.

To begin with, nothing in the ballot pamphlet *expressly* addressed the impact of Proposition 8 on same-sex couples who had married before its effective date. That alone makes it anything but "very clear" (*Myers*, 28 Cal. 4th at 841) that the initiative was intended to affect pre-existing

marriages. Because retroactive application was not brought to the attention of the voters, there is no reason to believe that voters intended that Proposition 8 invalidate existing marriages.

Moreover, the impartial and presumably accurate portions of the ballot pamphlet – prepared by state officials, not by the proponents or opponents of Proposition 8 – often used forward-looking language to describe the initiative's effects, which implied that Proposition 8 would *not* affect existing marriages. For example, the Official Title prepared by the Attorney General was "Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment." Voter Guide 3, 9, 54-57. This language did not indicate that the law would apply retroactively to already-married couples. Rather, by referring to the "right . . . to marry," this language suggested that the measure would only mean that same-sex couples could no longer *get* married. The same is true of the Summary section of the Quick-Reference Guide, which stated that Proposition 8 "[c]hanges California Constitution to eliminate the right of same-sex couples to marry." *Id.* at 9. The Summary prepared by the Attorney General repeated this language almost verbatim. *Id.* at 54.

The Interveners claim that "[i]f Proposition 8 was intended only to prevent new same-sex couples from getting married" (Int. Br. at 39-40) the Official Title and Summary prepared by the Attorney General would only have noted that Proposition 8 eliminates the right of same-sex couples to marry in California and would not have needed to state that it "[p]rovides that only marriage between a man and a woman is valid or recognized in California." *Id.* This contention is disingenuous. Unlike the presentation in the Interveners' brief, the Official Title and Summary did not claim that Proposition 8 does "two things" (*see* Int. Br. at 39) and it did not number

the statements or use the conjunction "and" to join them. The Official Title and Summary actually read as follows:

> ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY, INITIATIVE CONSTITUTIONAL AMENDMENT.
>
> - Changes the California Constitution to eliminate the right of same-sex couples to marry in California.
> - Provides that only marriage between a man and a woman is valid or recognized in California.

The first bullet states the *effect* of Proposition 8: that same-sex couples can no longer "marry in California." The second bullet does not purport to state a *second* effect; rather, it sets out, verbatim, the actual language of Proposition 8. Moreover, even if the two bulleted statements were intended to summarize different effects of Proposition 8, there is no evidence that the second statement has anything to do retroactivity. Because the first bullet refers to marriages performed in California, if the second bulleted statement has any broader or different meaning, it would be to make clear that it "appl[ies] both to marriages performed in California and those performed in other jurisdictions." *In re Marriage Cases*, 43 Cal. 4th at 797 (interpreting Proposition 8's identical language in Proposition 22).

Below the Summary in the Quick-Reference Guide was a section titled "What Your Vote Means." Voter Guide 9. More than any other portion of the Voter Guide, this section represented an official, impartial analysis of the intended effects of Proposition 8. Any voter unclear about whether Proposition 8 would invalidate existing marriages would look to this section for the answer, because it officially and accurately described Proposition 8's effects. *It was silent on the issue of retroactive versus*

prospective application.[21] That is the antithesis of a "clear and unavoidable implication" that Proposition 8 would apply retroactively. *McClung*, 34 Cal. 4th at 475 (citation omitted).

Likewise, the Analysis by the Legislative Analyst said nothing about existing marriages, but suggested only that Proposition 8 would overturn this Court's ruling in the *Marriage Cases* so that, going forward, "individuals of the same sex would not have the right to marry in California."[22]

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[21]The "YES" column noted only that "A YES vote on this measure means: The California Constitution will specify that only marriage between a man and a woman is valid or recognized in California." Voter Guide 9.

The "NO" column stated: "A NO vote on this measure means: Marriage between individuals of the same sex would continue to be valid or recognized in California." *Id.*

[22]The background section of the Analysis By The Legislative Analyst stated:

> In March 2000, California voters passed Proposition 22 to specify in state law that only marriage between a man and a woman is valid or recognized in California. In May 2008, the California Supreme Court ruled that the statute enacted by Proposition 22 and other statutes that limit marriage to a relationship between a man and a woman violated the equal protection clause of the California Constitution. It also held that individuals of the same sex have the right to marry under the California Constitution. As a result of the ruling, marriage between individuals of the same sex is currently valid or recognized in the state. (Voter Guide 55)

It then described what Proposition 8 proposes:

> This measure amends the California Constitution to specify that only marriage between a man and a woman is valid or recognized in California. As a result, notwithstanding the California Supreme Court ruling of May 2008, marriage would be limited to individuals of the opposite sex, and *individuals of the same sex would not have the right to marry in California.* (*Id.* (emphasis added))

Even those portions of the Voter Guide prepared by the proponents and opponents of Proposition 8 were, at best, ambiguous on the question of retroactivity. The "PRO" argument in the Quick-Reference Guide claimed that Proposition 8 "fixes" the "mistake" of the Court's decision in the *Marriage Cases* "by reaffirming traditional marriage." Voter Guide 9. It also stated that Prop 8 "doesn't take away any rights or benefits from gay domestic partners."[23] *Id.* But the reference to the Court's "mistake" does not reflect retroactive intent; the general presumption against retroactive application applies even when a law is intended to overturn a judicial decision. *See McClung*, 34 Cal. 4th at 473-75.

The "Argument In Favor Of Proposition 8" ("Argument in Favor") said nothing about invaliding existing marriages and, if anything, implied that Proposition 8 would not have that effect. It began by equating the measure with Proposition 22 – *an initiative that had nothing to do with abolishing pre-existing marriages of same-sex couples*:

> Proposition 8 is simple and straightforward. It contains the same 14 words that were previously approved in 2000 by over 61% of California voters: "Only marriage between a man and a woman is valid or recognized in California." Voter Guide 56.

But, of course, there *were* no marriages between same-sex couples to abolish back in 2000. So without any explanation that those "same 14 words" were now intended to invalidate pre-existing marriages, a voter would have had no reason to attribute to those words a broader, and more destructive, meaning than they had in 2000. The Argument in Favor also

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[23]The Argument in Favor of Proposition 8 contains a similar statement. Voter Guide 56.

identified three "simple things" that Proposition 8 would do,[24] but none discussed marriages that would have been performed by the time of the election.

The Argument in Favor's silence on the effect of Proposition 8 on existing marriages may well reflect its proponents' political calculation that Proposition 8 would fare better if voters did not consider the question. *See Evangelatos*, 44 Cal. 3d at 1212; *see also Myers*, 28 Cal. 4th at 845 ("addition [of ambiguous language] to the Repeal Statute . . . may have been the product of a legislative compromise [as] a way for legislators with differing views on retroactivity to vote for the Repeal Statute") (citation and internal quotation marks omitted). After all, Proposition 8 passed by only 4.6 percentage points.[25] If California voters had been told up front and in no uncertain terms that Proposition 8 would extinguish thousands of people's marriages, it surely is possible that enough voters would have changed their mind and voted "no" to change the outcome.

The last page of the Voter Guide's Proposition 8 materials contained both the "Argument Against Proposition 8" ("Argument Against") and the "Rebuttal To Argument Against Proposition 8" ("Rebuttal to Argument Against"). Voter Guide 57. Because neither the text of the measure nor the arguments in favor addressed the issue of retroactivity, the opponents had

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[24]It stated that "Proposition 8 does three simple things": (1) "*It restores the definition of marriage*," (2) "*It overturns the outrageous decision of four activist Supreme Court judges* who ignored the will of the people" and (3) "*It protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." Voter Guide 56 (emphases in original).

[25]California Secretary of State, *Votes For and Against November 4, 2008, State Ballot Measures*, http://vote.sos.ca.gov/ Returns/props/59.htm.

no occasion to do so. The "Rebuttal To Argument In Favor Of Proposition 8" ("Rebuttal to Argument in Favor") was silent on that issue. It did state, among other things, that "PROP. 8 TAKES AWAY THE RIGHTS OF GAY AND LESBIAN COUPLES AND TREATS THEM DIFFERENTLY UNDER THE LAW." *Id.* at 56 (emphasis in original). It also argued that "Prop. 8 means one class of citizens can enjoy the dignity and responsibility of marriage, and another cannot." *Id.* But these statements were susceptible to the inference that the "right" being taken away was the right to *get* married, not the right to *stay* married; that is at least as plausible an inference as the opposite.

Likewise, the Argument Against did not address the retroactivity issue. It described the inequality of denying gay and lesbian couples the right to marry but did not discuss already-married same-sex couples. And in several instances it used forward-looking language: "[t]hose committed and loving couples who want to accept the responsibility that comes with marriage should be treated like everyone else" and "the government has no business telling people who can and cannot get married." *Id.* at 57.

The Rebuttal to Argument Against also did not identify or address the issue of retroactivity. It began with four assertions that had nothing remotely to do with that issue.[26] The fifth, and last, point stated: "Your YES vote on Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, regardless of when or

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[26]It first claimed that "Proposition 8 is about traditional marriage; it is not an attack on gay relationships." Voter Guide 57. Second, "[w]hat Proposition 8 does is restore the meaning of marriage." *Id.* Third, it noted that Proposition 8 overturns this Court's ruling in the *Marriage Cases*. *Id.* Fourth, it argued that Proposition 8 "ensures that parents can teach their children about marriage according to their own values and beliefs." *Id.*

where performed." *Id.* This single word "when" was the *only* temporal reference in any of the ballot materials. That single word would not inform even the most discerning reader that Proposition 8 would invalidate existing marriages. But even if an especially astute and careful voter could have read it that way, the sentence was buried at the back of the ballot materials, toward the end of a *rebuttal* argument. Voters cannot be expected to slog through a lengthy set of arguments for and against an initiative measure[27] with the meticulous eye of an estates and trusts lawyer attempting to avoid violating the Rule Against Perpetuities. An obscure reference at the tail end of the rebuttal arguments does not make it "*very clear* . . . that the [voters] must have intended a retroactive application" (*Myers*, 28 Cal. 4th at 841) (citation omitted; emphasis in original), particularly when the ballot pamphlet expressly told the voters that the rebuttal arguments – like all the arguments pro and con – "are the opinions of the authors and have not been checked for accuracy by any official agency." Voter Guide 56-57. Moreover, for the proponents of Proposition 8 now to say that this final portion of their rebuttal argument makes Proposition 8's retroactive intent "explicit" (Int. Br. at 40) – rather than anything contained in their opening "Argument In Favor Of Proposition 8" – raises serious questions as to whether they intentionally buried this statement at the back of the ballot materials with the hope that it would go unnoticed. *Cf. Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 981 (1997) (recognizing that summary portion of ballot materials located visibly in the beginning of voter pamphlet "would be a part of even a casual reading by a voter" as

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[27] And this was not the only matter discussed in the ballot pamphlet, which consisted of 143 densely worded pages.

contrasted with text "hidden in small print many pages back"). At the least, retroactive effect would have to have been disclosed in the *opening* ballot argument – not saved for the rebuttal.[28]

The initiative process only works if the voters know what they are voting on. For this reason, the statutes governing initiatives prescribe a detailed procedure for disclosing sufficient information in the ballot pamphlet to enable voters to make informed decisions.[29] Here, the retroactivity issue was never disclosed to the voters. Nor was the wisdom and fairness of a retroactive application debated in the ballot arguments. The one word in the rebuttal argument that Proposition 8's proponents could rely on was insufficient to disclose to voters that they needed to consider the "potential unfairness of retroactive application [of Proposition 8] and determine[] [whether] it is an acceptable price to pay for the countervailing benefits." *McClung*, 34 Cal. 4th at 476 (quoting *Landgraf*, 511 U.S. at 272-73).

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[28]Surely, new effects of an initiative measure can no more be disclosed for the first time in rebuttal than new legal arguments can be made for the first time in a rebuttal brief, when the opponent has no opportunity to respond.

[29]*See, e.g.*, Elec. Code §9051 ("the Attorney General shall give a true and impartial statement of the purpose of the measure in such language that the ballot title shall neither be an argument nor be likely to create prejudice, for or against the proposed measure"); *id.* §9084 (contents of ballot pamphlet); *id.* §9085(a) (summary section shall be prepared by Legislative Analyst and "provide[] a concise summary of the general meaning and effect of 'yes' and 'no' votes on each state measure"); *id.* §9086 (contents as to each measure); *id.* §9087 ("Legislative Analyst shall prepare an impartial analysis of the measure . . . [that includes] the effect of the measure on existing law and the effect of enacted legislation which will become effective if the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure.").

Were this a securities fraud case, no court would find this one word at the back of the ballot materials to be adequate disclosure. It is even less adequate here, because retroactive application of Proposition 8 would raise fundamental issues of fairness. Ultimately, "[n]either the Legislative Analyst's analysis of Proposition [8] nor any of the statements of the proponents or opponents that were before the voters in the ballot pamphlet spoke to the retroactivity question, and thus there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all." *Evangelatos*, 44 Cal. 3d at 1212. On the contrary,

> [b]ecause past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction, informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure – like other statutes – would be applied prospectively because no express provision for retroactive application was included in the proposition. *Id.* at 1212-13 (citations omitted).

Moreover, "a voter who supported the [prospective] changes embodied in Proposition [8] would not necessarily have supported the retroactive application of those changes to defeat the reasonable expectations of" couples who married before the election. *Evangelatos*, 44 Cal. 3d at 1217. With so close a vote, the absence of fair notice of retroactive effect – had such been intended – may well have been dispositive. After all, only 2.3% of the electorate – 299,802 voters – would have to have been persuaded to vote "no" by disclosure of retroactive effect to have defeated Proposition 8. It is not inconceivable that many voters would have voted differently had they known that Proposition 8 might undo 18,000 marriages and thereby permanently alter the family status of 36,000 of their fellow citizens and their children. This is not an issue that should

be left to speculation. *See id.* ("The crucial point is simply that because Proposition [8] did not address the retroactivity question, we have no reliable basis for determining how the electorate would have chosen to resolve either the broad threshold issue of whether the measure should be applied prospectively or retroactively, or the further policy question of *how* retroactively the proposition should apply if it was to apply retroactively.") (emphasis in original).

Reading the Voter Guide in its entirety, it is impossible to conclude that either Proposition 8's drafters or, more importantly, the voters *clearly* intended Proposition 8 to extinguish the marriages of tens of thousands of couples who relied on the Court's determination that the California Constitution protected their right to marry.

3. Widely Disseminated Information About Proposition 8, Including the Position Of the Attorney General, Conveyed Substantial Doubt That Proposition 8 Would Be Applied Retroactively.

Prior to the election, many articles informed the public that the Attorney General and many legal experts believed Proposition 8 would not invalidate existing marriages.[30] An article in the *Los Angeles Times* quoted Attorney General Brown's view that "Proposition 8 would not be retroactive and that existing marriages would stand."[31] It cited leading legal scholars, UCLA Professor Grace Blumberg and UC Irvine Dean Erwin

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[30]*See* Bob Egelko, *Prop. 8 Not Retroactive, Jerry Brown Says*, S.F. Chron., Aug. 5, 2008, *available at* http://www.sfgate.com/bin/.cgi?f=/// 2008/08//P1250FN.DTL; *see also* notes 31-32, *infra.*

[31]Maura Dolan & Jessica Garrison, *Gay Married Couples Face Legal Limbo If Prop. 8 Passes*, L.A. Times, Oct. 30, 2008, *available at* http:// www.latimes.com///me-marriagelaw30-2008oct30,0,3560871.story.html.

Chemerinsky, as expressing that view or, at the least, doubts on that issue. *Id.* The *San Francisco Chronicle* likewise reported the position of the Attorney General, and cited Stanford Professor Jane Schacter and UC Berkeley Professor (and former Dean) Jesse Choper expressing similar doubts that the law would be applied retroactively; it also quoted the "chief lawyer for the Yes on 8 campaign" as saying "I don't think the law is clear on that."[32] Other California newspapers also informed the public that it was unclear whether Proposition 8 would invalidate existing marriages.[33] One such article by the Associated Press has been reprinted widely, not only in California but also nationally. *See* Lisa Leff, *Anxious Eyes on Calif. Measure Over Gay Marriage*, Associated Press, Oct. 31, 2008.[34]

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[32]Bob Egelko, *If Prop. 8 Passes, What About Those Who Wed?*, S.F. Chron., Nov. 1, 2008, *available at* http://www.sfgate.com//article.cgi?f=/////P1GT.DTL&hw=+retroactive &sn=&sc=.html.

[33]*See, e.g.*, Diana Marcum, *Prop. 8 Spurs Last-Minute Rush to Marry*, Fresno Bee, Oct. 31, 2008, *available at* http:// www.fresnobee.com/local/story/.html; Jennifer Garza, *Fate of 11,000 Same-Sex Marriages Uncertain If Prop. 8 Passes*, Sacramento Bee, Oct. 21, 2008, *available at* http://www.sacbee.com///1329814.html; James Burger, *Proposition 8: How Locals Want 'Marriage' Defined*, Bakersfield Californian, Oct. 4, 2008, *available at* http:// www.bakersfield.com/_news//.html; *Prop. 8 Sign-Stealing Ignites Free Speech Debate*; *More On Prop. 8*, Orange County Register, Oct. 30, 2008, *available at* http:// www.ocregister.com/articles/signs-stolen-people-2211707-proposition-singam.html; *Gay Weddings Spike Before Election*, Palm Springs Desert Sun, Oct. 14, 2008, *available at* http://www.mydesert.com/article/20081014/NEWS01/810140306.html.

[34]The Associated Press article by Lisa Leff, *Anxious Eyes on Calif. Measure Over Gay Marriage*, appeared in The Modesto Bee, Nov. 1, 2008, *available at* http://www.modbee.com/elections/story/483596.html; The San Jose Mercury News, Oct. 31, 2008, *available at* http://www.mercurynews.com/nationworld/ci_10867773; and The San Diego-Union Tribune, Oct. 31, 2008, *available at* http://www.signonsandiego.com/news/state/20081031-1840-ca-gaymarriage.html. It also appeared nationally in a wide range of

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These publicly expressed views reinforce the conclusion that other sources available to voters did not "provide a clear and unavoidable implication" of retroactive intent. *McClung*, 34 Cal. 4th at 475.

IV. SAN FRANCISCO AND ITS ALLIES HAVE STANDING TO CHALLENGE THE VALIDITY OF PROPOSITION 8.

Interveners contend the Public Entity Petitioners[35] lack standing to challenge Proposition 8.[36] They are wrong. As alleged in the Petition, these Petitioners will suffer a direct financial injury from the implementation of Proposition 8. Thus, they are beneficially interested

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newspapers, such as The International Herald Tribune, Oct. 31, 2008, *available at* http://www.iht.com/articles/ap/2008/10/31/america/NA-US-Election-Gay-Marriage.php; The Chicago Tribune, Nov. 2, 2008, *available at* http://www.chicagotribune.com/news/nationworld/bal-te.gaymarriage02nov02,0,6809252.story; The Sun-Sentinel, Nov. 2, 2008, *available at* http://www.southflorida.com/movies/bal-te.gaymarriage02nov02,0,6350251.story; The Boston Herald, Oct. 31, 2008, *available at* http://news.bostonherald.com/news/national/west/view/2008_10_31_Anxious_eyes_on_California_measure_over_gay_marriage/; and the Anchorage Daily News, Oct. 31, 2008, *available at* http://www.adn.com/nation/v-printer/story/574515.html. It also appeared on national news websites, such as Topix, Oct. 31, 2008, http://www.topix.net/state/ca/2008/10.

[35] These Petitioners include the City and County of San Francisco, the County of Santa Clara, the City of Los Angeles, the County of Los Angeles, the County of Alameda, the County of Marin, the County of San Mateo, the County of Santa Cruz, the City of Fremont, the City of Laguna Beach, the City of Oakland, the City of San Diego, the City of Santa Cruz, the City of Santa Monica, and the City of Sebastopol.

[36] Neither respondents Edmund G. Brown, Attorney General of the State of California, Mark Horton, the State Registrar of Vital Statistics and the Director of the California Department of Public Health (CDPH), Linette Scott, the Deputy Director of Health, Information & Strategic Planning for the CDPH, nor any individual petitioners challenge the standing of the Public Entity Petitioners to bring this action.

and, for this reason alone, have standing to bring this challenge. The Counties also have an independent basis for standing under the public right doctrine established by this Court in *Green v. Obledo*, 29 Cal. 3d 126 (1981). Neither this Court's ruling in *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055 (2004), nor the federal constitutional rule prohibiting political subdivisions from raising federal constitutional challenges to state actions bars this challenge under the revision/amendment, Cal. Const., art. II, § 8 & art. XVIII, § 3, and separation of powers, Cal. Const., art. III, § 3, clauses of the California Constitution. Indeed, allowing the Public Entity Petitioners to challenge Proposition 8 under the California Constitution fully comports with the purpose behind the standing requirement: "to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." *Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 439 (1989).

A. Because They Have Suffered A Direct Financial Injury From The Implementation Of Proposition 8, Counties And Municipalities Have A Beneficial Interest In Invalidating Proposition 8 And Therefore Have Standing To Seek A Writ Of Mandate Against The State And Its Agents.

According to Interveners, the Public Entity Petitioners lack standing because they have not alleged an "injury in fact." But Interveners ignore crucial allegations in the Petition. In fact, the Public Entity Petitioners allege direct financial injuries from the implementation of Proposition 8. These allegations satisfy the "injury in fact" requirement and establish that these Petitioners have standing to assert this mandamus action.

A petitioner has standing to seek a writ of mandate pursuant to Code of Civil Procedure section 1086 if it is "beneficially interested" in the

subject matter of the action. *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 21 Cal. 4th 352, 360-361 (1999). In other words, the petitioner must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." *Carsten v. Psychology Examining Comm'n*, 27 Cal. 3d 793, 796 (1980). But once the petitioner establishes a beneficial interest, that interest alone is sufficient to establish the petitioner's standing to pursue the mandamus action. *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 272 (1975).

The beneficial interest requirement is equivalent to the federal "injury-in-fact" requirement. *See Associated Builders*, 21 Cal. 4th at 362. Thus, the existence of an economic injury is sufficient to create standing under both the beneficial interest and the federal "injury-in-fact" requirements. *See Clinton v. City of New York,* 524 U.S. 417, 432-433 (1998) ("The Court routinely recognizes . . . economic injury resulting from governmental actions . . . as sufficient to satisfy the Article III 'injury in fact' requirement."); *Jacoby v. State Bd. of Optometry*, 81 Cal. App. 3d 1022, 1030 (1978) (holding that economic injury in form of loss of business caused by enactment is sufficient to establish standing to seek writ relief).

Here, each Public Entity Petitioner has alleged that it will suffer a direct economic injury from the implementation of Proposition 8.[37] *See*

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[37] The economic injuries suffered by the Public Entity Petitioners due to the implementation of Proposition 8 are multifold. For example, due to Proposition 8, these Petitioners have lost the fees – such as marriage license and recording fees – that would have been generated from same-sex couples who wished to marry. They have also lost the taxes and other revenues that would have been generated from same-sex weddings and tourism associated with those weddings. *See, e.g.,* Gholston, L., *Same-Sex Marriage Fuels Tourism for Gays and Lesbians*, Oakland Tribune (Oct. 19,

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Pet. at 2-8 (alleging that "denial of the right of same-sex couples to marry would have an adverse financial impact"). Interveners do not mention, much less challenge, these allegations. Because the Public Entity Petitioners have suffered and will continue to suffer a direct economic injury due to Proposition 8, they have suffered an "injury in fact" and are beneficially interested in the subject matter of this action.

In arguing otherwise, Interveners misconstrue the beneficial interest requirement. Interveners contend the Public Entity Petitioners lack standing because their injuries are the same as "all other municipalities in California." Interveners' Opposition Brief in Response to City and County of San Francisco, et al.'s Second Amended Petition at 3. But Petitioners need only establish an interest "over and above the interest held in common with the *public at large*" in order to establish a beneficial interest. *Carsten*, 27 Cal. 3d at 796 (emphasis added). By alleging a direct economic injury

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(http://findarticles.com/p/articles/mi_qn4176/is_20081019/ai_n30926324). This includes sales tax revenues, hotel tax revenues, airport revenues, parking fee revenues, fees for rental of public buildings, as well as payroll tax revenues for hotel and restaurant workers. Finally, the Public Entity Petitioners must bear the financial burden of providing health care, welfare benefits, and other social services to adults and children who become dependent when families fall apart. Denying same-sex couples the right to marry makes it less likely that such couples will formalize their relationships in a way that imposes obligations of support upon which adults and children may rely in situations where relationships break down and increases the likelihood of dependence on local health and welfare programs. The availability of domestic partnerships mitigates but does not eliminate this burden because domestic partnerships are less well recognized and valued by society and therefore less desirable in the eyes of many lesbians and gay men, leading some couples to forego recognition of their relationships altogether if marriage is not permitted.

from the implementation of Proposition 8 – an injury not suffered by the public at large – the Public Entity Petitioners have done so. Accordingly, they have standing to assert this mandamus action.

B. Counties Have Independent Standing To Pursue This Mandamus Action Because Proposition 8 Directly Imposes Duties On Them.

Even if counties did not have a beneficial interest in the subject matter of this action, they would still have standing to challenge Proposition 8 under the "public right" doctrine.

In cases where a public right is involved, California courts have recognized an exception to the general rule that a party must have a beneficial interest in order to sue. *See Green*, 29 Cal. 3d at 144; *Bd. of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 100-101 (1945); *see also Common Cause*, 49 Cal. 3d at 439. "[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." *Bd. of Social Welfare*, 27 Cal. 2d at 100-101. Applying this doctrine, California courts have held that a local public entity or official may challenge the constitutionality of a state law because that entity or official has a duty to administer and enforce that law. *See, e.g., County of San Diego v. San Diego NRML*, 165 Cal. App. 4th 798, 816-818 (2008) (holding that public entity had standing to raise constitutional challenge to enactment that imposed duties on entity itself); *Central Delta Water Agency v. State Water Res. Control Bd.*, 17 Cal. App. 4th 621, 630 (1993) (finding standing where rights of residents were inextricably bound up with public entity's duties); *Selinger v. City Council*, 216 Cal. App. 3d 259, 271 (1989) (holding that

City Council had standing to challenge constitutionality of statute where rights of citizens were inextricably bound up with City's duties to carry out the law).

In this case, the validity of Proposition 8 undoubtedly raises a question of a public right under the California Constitution. And the sole object of this action is to procure the enforcement of the public duty of the State and its agents to follow the revision/amendment and separation of powers clauses of the California Constitution. Because counties must administer and enforce Proposition 8,[38] they have standing to challenge its constitutionality under the public right doctrine. See *San Diego NRML*, 165 Cal. App. 4th at 816-818; *see also Central Delta*, 17 Cal. App. 4th at 630; *Selinger*, 216 Cal. App. 3d at 271. And their standing should not and does not depend on whether their duty to enforce the law is ministerial or discretionary. Indeed, their need to raise the challenge is even greater where their duty to enforce the law is ministerial because they have no means of avoiding the infringement of their citizens' public rights. Accordingly, counties have independent standing to challenge the constitutionality of Proposition 8 under the public right doctrine.

C. Nothing in *Lockyer* Bars Counties Or Municipalities From Challenging The Validity Of Proposition 8 Under The California Constitution.

Citing *Lockyer*, Interveners contend this Court has already barred the Public Entity Petitioners from challenging the constitutionality of Proposition 8. But Interveners misconstrue *Lockyer*. In *Lockyer*, this Court held that the City and County of San Francisco could not refuse to enforce a

[38] *See* Fam. Code §§ 300, 350-359, 423 & 425 (setting forth duties of county clerks and county recorders in issuing and recording marriage licenses).

statute in order to obtain a ruling on the constitutionality of that statute. *See Lockyer*, 33 Cal. 4th at 1099. It did *not* decide whether counties and municipalities could challenge the constitutionality of the marriage statutes.[39] Although this Court in *Lockyer* did suggest that *one* possible method for raising the constitutionality of an enactment preventing same sex couples from marrying would be for a couple denied a marriage license to challenge the marriage statutes, it did not, by any means, preclude counties or municipalities from making that same challenge. *Id.* at 1099. Instead, the Court specifically disclaimed any intention to do so: "We have no occasion in this case to determine whether the city properly could maintain a declaratory judgment action in this setting." *Id.* at 1099, n.27.

Indeed, this Court in *Lockyer* implied that counties and municipalities could pursue an action challenging the constitutionality of an enactment. For example, this Court acknowledged that counties and municipalities may raise constitutional challenges to state enactments in other contexts. *See id.* at 1099, n.27 ("we note in another context the Legislature specifically has authorized a public official who questions the constitutionality or validity of an enactment to bring a declaratory judgment action rather than act in contravention of the statute"). And in another part of the opinion, this Court observed that allowing a local official to ask "a court to determine the constitutionality of a statute" raises "much less concern" than allowing that same official to refuse to "enforce a statute based on the official's opinion that the statute is unconstitutional." *Id.* at 1105, n.34.

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[39] The Court declined to address this issue in its decision invalidating the marriage statutes because it was not properly raised. *See In re Marriage Cases*, 43 Cal. 4th at 757, n.9.

Finally, Interveners' reliance on *Lockyer* ignores the purpose behind the standing doctrine. According to Interveners, the Public Entity Petitioners lack standing because they have a duty to enforce Proposition 8 until a court holds otherwise. But the standing doctrine does not concern the propriety of civil disobedience by public officials. Rather, it seeks to insure that parties have "sufficient interest in the subject matter of the dispute to press their case with vigor." *Common Cause*, 49 Cal. 3d at 439. The fact that the Public Entity Petitioners have a legal duty to conform their conduct to Proposition 8 until a court declares it invalid does not diminish the economic injury that they would suffer from doing so or the public right that they seek to uphold. Nor does this fact diminish the vigor in which Petitioners would press their case. Accordingly, nothing in *Lockyer* bars the Public Entity Petitioners from raising this challenge to Proposition 8.

D. Cases Limiting The Ability Of Political Subdivisions To Challenge The Federal Constitutionality Of State Laws Do Not Bar Counties Or Municipalities From Challenging The Validity Of Proposition 8 Under The California Constitution.

Relying on federal precedent, this Court has recognized the federal rule that counties and municipalities lack standing to "invoke the *federal* Constitution to challenge a state law which they are otherwise duty-bound to enforce" in certain limited circumstances. *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 5-6 (1986) (emphasis added). "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state." *Id.* Citing this rule, Interveners contend the Public Entity Petitioners are barred from invoking the *California* Constitution to challenge Proposition 8.

As explained below, Interveners are wrong. This Court has never extended the federal rule to bar challenges under the California Constitution. This is because the California Constitution, unlike the federal Constitution, does grant privileges and immunities to counties and municipalities and gives the legislature plenary power to delegate powers to counties and municipalities – including plenary power to sue the State and its agents. Because the legislature has given counties and municipalities the power to seek mandamus relief from the State and its agents pursuant to the California Constitution, the federal rule does not bar this action.

In any event, this action falls within two separate exceptions to the federal rule. First, this rule does not apply where, as here, the action seeks to protect the public interest in observing the boundaries of power among voters and the three branches of California government. Second, the rule does not apply where, as here, the legal duties of the Public Entity Petitioners are inextricably bound up with the rights of its residents. *Community Television of So. Cal. v. County of Los Angeles*, 44 Cal. App. 3d 990 (1975) does not suggest otherwise. Accordingly, this Court should hold that the Public Entity Petitioners have standing here.

1. Consistent With The California Constitution, The Legislature Has Given Counties And Municipalities The Power To Challenge The Validity Of Initiatives Under The California Constitution.

In *Star-Kist Foods*, this Court considered "whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." 42 Cal. 3d at 6. Relying on federal precedents, this Court recognized "the well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal

protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." *Id.* At the same time, it observed that "[t]his rule's application beyond Fourteenth Amendment and contract clause challenges remains unsettled" and did not extend the rule to challenges under the California Constitution. *Id.* And since *Star-Kist*, no California court has applied the rule to bar counties or municipalities from invoking the California Constitution to challenge an enactment by the Legislature or California voters.[40]

Interveners now seek to extend the federal *Star-Kist* rule to challenges under the California Constitution. But the federal rule has no application here. Unlike the federal Constitution – which does not distinguish between states and their political subdivisions – the California Constitution distinguishes political subdivisions like counties and municipalities from the State and gives the legislature plenary authority to delegate powers to counties and municipalities. Because the legislature has given counties and municipalities the power to challenge state laws under the California Constitution, Petitioners have standing to do so here.

Under the California Constitution, " '[s]uits may be brought against the state in such manner and in such courts as shall be directed by law.' " *Stanley v. City & County of San Francisco*, 48 Cal. App. 3d 575, 578 (1985) (quoting Cal. Const., art. III, § 5). In Government Code section 945,

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[40] In dicta and with no analysis, a Court of Appeal has stated that counties and municipalities lack "standing to raise equal protection challenges to action by state government." *City of Malibu v. Cal. Coastal Comm'n*, 121 Cal. App. 4th 989, 994, n.3 (2004). Nonetheless, that Court of Appeal refused to bar the city from challenging a state statute under article IV, section 16 of the California Constitution – which prohibits "special legislation." *Id.*

the legislature has established that "[a] public entity may sue and be sued." Thus, a public entity like a county or municipality may sue the State whenever that entity satisfies the statutory requirements for doing so. *See Stanley*, 48 Cal. App. 3d at 578-79 (holding that "an action against the state may be brought only in a manner and within the time allowed by statute").

In this case, Petitioners seek a writ of mandate against the State and its agents pursuant to Code of Civil Procedure section 1086. That section provides that a writ of mandate "*must* be issued *in all cases* where there is not a plain, speedy, and adequate remedy, in the ordinary course of law" and "upon the verified petition of *the party beneficially interested.*" (Emphasis added). Thus, *any* "party beneficially interested" – including *any* county or municipality with a beneficial interest – has standing to seek a writ of mandate against the State and its agents based on violations of the California Constitution. Indeed, nothing in title 1 of the Code of Civil Procedure – which governs "Writs of Review, Mandate, and Prohibition" – limits the ability of counties or municipalities to require the State and its agents to perform their ministerial duties under the California Constitution. Consistent with this, counties and municipalities have regularly sought and obtained writs of mandate against the State. *See, e.g., County of San Diego v. Bowen*, 166 Cal. App. 4th 501 (2008) (issuing writ of mandate to county challenging Secretary of State's conditional recertification procedures); *County of Los Angeles v. Comm'n on State Mandates,* 32 Cal. App. 4th 805 (1995) (deciding on the merits writ of mandate action by county challenging state statute pursuant to article XIIIB, section 6 of the California Constitution). Because the Public Entity Petitioners are beneficially interested in the subject matter of this action, *see* pp. 67-70, *supra*, and have independent standing to sue the State under the public right

doctrine, *see* pp. 70-71, *supra*, they satisfy the requirements for bringing suit under Code of Civil Procedure section 1086 and may therefore invoke the California Constitution to challenge Proposition 8.

Cases barring counties and municipalities from invoking the federal Constitution to challenge a state statute do not compel a contrary conclusion. Under the federal constitution, a county or municipality " 'has no privilege or immunities . . . which it may invoke in opposition to the will of its creator.' " *Star-Kist*, 42 Cal. 3d at 6 (quoting *Williams v. Mayor of Baltimore,* 289 U.S. 36, 40 (1933)). By contrast, the California Constitution does grant privileges and immunities to counties and municipalities. Indeed, over 100 years ago, this Court upheld a challenge by a municipality to a state statute under the equal protection clauses of the California Constitution. *See City of Pasadena v. Stimson,* 91 Cal. 238, 249 (1891). And more recently, a Court of Appeal held that a county had standing to assert a due process challenge on behalf of its affected property owners. *See Drum v. Fresno County Dept. of Public Works*, 144 Cal. App. 3d 777, 787 (1983).

In any event, the California Constitution gives the legislature plenary power to grant counties and municipalities privileges and immunities which they may invoke against the State. *See Star-Kist*, 42 Cal. 3d at 6. And the legislature has exercised this power and given counties and municipalities the power to seek a writ of mandate against the State and its agents pursuant to the California Constitution. *See, e.g.*, Gov. Code, § 945; Code of Civ. Proc., § 1086; *see also* Gov. Code, §§ 814-996.6. Because the "[r]ights guaranteed by" the California Constitution "are not dependent on those guaranteed by the United States Constitution," Cal. Const., art. I, § 24, *federal* constitutional limitations on the powers of counties and

municipalities to assert *federal* constitutional challenges do not apply to challenges under the California Constitution. Indeed, this Court has recognized that the federal rule simply " 'adhere[s] to the substantive principle that the [federal] Constitution does not interfere in a state's internal political organization.' " *Star-Kist*, 42 Cal. 3d at 8 (quoting *Rogers v. Brokette*, 588 F.2d 1057, 1070 (5th Cir. 1979). And nothing in the federal or California Constitutions restricts the legislature's power to confer standing on counties or municipalities to challenge the validity of initiative measures like Proposition 8 under the California Constitution. *See* pp. 72-73, *supra*. Accordingly, no rule bars the Public Entity Petitioners from challenging Proposition 8 on *state* constitutional grounds.

2. Counties And Municipalities May Invoke Structural Provisions In Constitutions That Protect The Boundaries Of Governmental Power To Challenge An Initiative.

Even if the federal *Star-Kist* rule applies to challenges under the California Constitution, this action falls within an exception to that rule. Under that exception, challenges to enactments premised on violations of constitutional provisions that define the boundaries of governmental power are not barred. *See Star-Kist*, 42 Cal. 3d at 8. Although Interveners assert that this action is a challenge under the equal protection clause of the California Constitution, they are wrong. This action challenges Proposition 8 under the revision/amendment clauses found in articles II and XVIII of the California Constitution, and the separation of powers clause found in article III, section 3 of the California Constitution.[41] Because these clauses

[41] Similarly, the Attorney General – who argues that Proposition 8 infringes a principle behind the California Constitution that cannot be overridden by amendment or revision – does not assert an equal protection challenge.

define the relative powers of the voters and the three branches of California government, this action falls outside any bar imposed by the federal *Star-Kist* rule.

In *Star-Kist*, this Court recognized an exception to the federal rule barring "subordinate political entities" from challenging "state action as violating the entities' rights under the" federal constitution for challenges premised on the federal supremacy clause. *Id.* at 8. In doing so, the Court distinguished federal constitutional provisions that " 'confer fundamental rights on individual citizens' " from provisions that establish " 'a structure of government which defines the relative powers of states and the federal government,' " *id.* (quoting *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283, 290 (S.D. Cal. 1978), and held that challenges to state statutes by political subdivisions based on the latter are not barred, *id.* Consistent with this distinction, this Court held that the federal rule did not bar a county from challenging a state statute under the commerce clause of the federal constitution. *Id.* at 10.

The same reasoning applies here. Like the federal supremacy and commerce clauses, the revision/amendment and separation of powers clauses of the California Constitution do not confer rights on individual citizens. Rather, those clauses establish a structure of government by defining the relative powers of the voters and the three branches of California government. Thus, this action by the Public Entity Petitioners – which challenges the validity of Proposition 8 under structural provisions of the California Constitution – falls outside the federal rule barring political subdivisions from challenging the constitutionality of state actions. *See Star-Kist*, 42 Cal. 3d at 9-10; *see also Zee Toys, Inc. v. County of Los Angeles*, 85 Cal. App. 3d 763, 778 (1978) (holding that county had standing

to challenge state statute under commerce clause because its interest "relates more to the national interest in observing the boundaries of state and federal power"). Indeed, California courts have regularly decided state constitutional challenges to initiatives asserted by local government entities. *See, e.g., Amador Valley Joint Union High School Dist. v. State Bd. of Equalization,* 22 Cal. 3d 208 (1978) (deciding challenge by school district to Proposition 13 based on voter initiative clause); *City of Rancho Cucamonga v. Mackzum,* 228 Cal. App. 3d 929 (1991) (deciding multiple state constitutional challenges by city to legislation that implemented Proposition 13). Accordingly, the federal rule, even if it were applicable, would not deprive the Public Entity Petitioners of standing to bring this action.

3. Counties And Municipalities May Challenge The Constitutionality Of Proposition 8 On Behalf Of Their Residents Because The Rights Of Their Residents Are Inextricably Bound Up With Their Legal Duties.

California courts have also recognized a second exception to the federal *Star-Kist* rule. Under this exception, "a political subdivision of the state may challenge the constitutionality of a statute or regulation on behalf of its constituents where the constituents' rights under the challenged provision are inextricably bound up with the subdivision's duties under its enabling statutes." *Central Delta*, 17 Cal. App. 4th 621, 630 (1993) (internal quotation marks omitted).

Because the Public Entity Petitioners are charged with administering and enforcing Proposition 8, *see supra* at 71, n.38, their legal duties are inextricably bound up with the constitutional rights of their residents. These Petitioners therefore have standing to assert the constitutional rights

of their residents notwithstanding the federal rule. *See Central Water*, 17 Cal. App. 4th at 630.

4. *Community Television* Does Not Compel A Contrary Result.

In asserting that the Public Entity Petitioners lack standing, the Interveners rely heavily on *Community Television*, 44 Cal. App. 3d 990. But their reliance is misplaced. In fact, *Community Television* – which predates this Court's decision in *Star-Kist* – does not support the denial of standing in this case.

First, *Community Television* was not a writ of mandate action. Thus, the county in *Community Television* could not obtain standing as a beneficially interested party under Code of Civil Procedure section 1086 and did not assert that it had such an interest. That county, unlike the Public Entity Petitioners, also could not assert standing under the public right doctrine.

Second, the Court of Appeal in *Community Television* implicitly acknowledged that the county had standing to invoke the California Constitution in challenging a state statute by deciding on the merits the county's challenge to a tax statute under article XVI, section 6 – which prohibits gifts of public monies. *See Community Television*, 44 Cal. App. 3d at 996-97. Although the Court of Appeal ostensibly rejected the county's equal protection challenge under the California Constitution for lack of standing, *see id.* at 998, the county did not appear to distinguish its state constitutional claim from its federal constitutional claim. Thus, the Court of Appeal in *Community Television* had no occasion to determine whether the bar on federal equal protection challenges applied to challenges under the equal protection clause of the California Constitution. *See, e.g.*,

Ginns v. Savage, 61 Cal. 2d 520, 524, n.2 (1962); *DCM Partners v. Smith*, 228 Cal. App. 3d 729, 739 (1991) ("A case does not stand for a proposition neither discussed nor analyzed.").

In any event, any extension by *Community Television* of the federal *Star-Kist* rule to state constitutional challenges is dubious. In denying standing, *Community Television* relied on cases that addressed the standing of political subdivisions to bring federal constitutional challenges, *see City of New York v. Richardson*, 473 F.2d 923 (2d Cir. 1973), or cases that discuss taxpayer standing, *see Flast v. Cohen*, 392 U.S. 83 (1968); *Harman v. City & County of San Francisco*, 7 Cal. 3d 150 (1972).[42] None of these cases suggests, much less holds, that political subdivisions lack standing to challenge state statutes under the California Constitution. Indeed, *Community Television* predates *Star-Kist* – which expressly states that the extension of the federal rule beyond the Fourteenth Amendment and contract clauses of the federal constitution is unsettled. *See Star-Kist*, 42 Cal. 3d at 6.

Third, unlike the county in *Community Television*, the Public Entity Petitioners are not asserting an equal protection challenge. Instead, they are challenging Proposition 8 under the revision/amendment and separation of powers clauses of the California Constitution. *Community Television* therefore does not apply.

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[42] The other federal case cited in *Community Television* actually supports the Public Entity Petitioners' standing to bring this action. See *Data Processing Serv. v. Camp,* 397 U.S. 150 (1970). The United States Supreme Court in *Data Processing* found standing where the plaintiff, like the Public Entity Petitioners, had an economic interest in the litigation. *Id.* at 152-55.

Finally, the county in *Community Television* did not contend it had standing for the reasons identified in *Central Delta* – which was decided 18 years after *Community Television*. As explained above, the Public Entity Petitioners meet the requirements for establishing standing under *Central Delta*. *See* pp. 70-71, *supra*. Accordingly, *Community Television* is inapposite and does not bar the Public Entity Petitioners from bringing this action.

CONCLUSION

As the above discussion shows, this case involves a collision between Proposition 8 and numerous provisions of the California Constitution. The measure collides with individual rights protections conferred by the equal protection provisions, the liberty clause, and the privacy clause. It collides with key structural protections, including the separation of powers principle embedded in Article III, and the assurance of article I, section 24 that the California Constitution provides independent protection for the citizens of this State. There is even a collision within article XVIII itself – between the power of initiative conferred by section 3 and the guarantee of sections 1 and 2 that the legislature be involved in deliberations over any measure that cuts against the constitutional grain. The only reasonable means of reconciling this conflict is to conclude that measures, like Proposition 8, that selectively deny inalienable rights to unpopular groups are beyond the scope of the amendment process. The Court therefore should grant the writ and ensure that this dark moment in California's history is short-lived.

Dated: January 8, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 24,666 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 8, 2009.

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PROOF OF SERVICE

I, HOLLY TAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On January 8, 2009, I served the following document(s):

CORRECTED REPLY OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.

on the following persons at the locations specified:

PLEASE SEE ATTACHED PROOF OF SERVICE

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery ☐ is attached** or ☐ **will be filed separately with the court.**

☐ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed January 8, 2009, at San Francisco, California.

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